

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE JUUL LABS, INC., MARKETING,
SALES PRACTICES, AND PRODUCTS
LIABILITY LITIGATION

Case No. 19-md-02913-WHO

**JOINT AND CONTESTED PROPOSED
JURY INSTRUCTIONS**

This Document Relates to:

*San Francisco Unified School District v.
JUUL Labs, Inc., et al.*

ALTRIA'S PRELIMINARY STATEMENT

Altria¹ submits these responses and objections to Plaintiff's proposed jury instructions and additional proposed jury instructions subject to the reservations and objections set forth below. Altria does not join in the submission of all of the proposed instructions below but instead agrees to and jointly proposes an instruction only where expressly indicated.

Altria states further that it prepared these responses, edits, and proposed instructions based on the Court's rulings on Altria's motions to dismiss and the Court's other rulings and orders in this litigation. Altria does not attempt to relitigate the issues addressed or implicated by those rulings and orders via these responses, edits, and proposed instructions or to propose edits or additional instructions based on positions the Court previously rejected. Altria does, however, expressly preserve every position it has asserted concerning those issues as well as the positions asserted by other Defendants that Altria has joined and/or incorporated by reference or which

¹ See ECF No. 3468 (stipulation providing that the four Altria Defendants—Altria Group, Inc., Philip Morris USA Inc., Altria Group Distribution Company, and Altria Client Services LLC—will be treated as single entity solely for purposes of trial in this case).

1 otherwise apply to the claims against Altria, including but not limited to the positions set forth
2 below and the positions set forth in support of Altria's motions for summary judgment and *Daubert*
3 motions.

4 Altria reserves the right to amend, supplement, or withdraw these responses, edits,
5 objections and additional proposed instructions, which are based on the current record in the case,
6 and to propose additional jury instructions, including definitional and limiting instructions, based
7 on future events (in this and other cases) including but not limited to the Court's final rulings on
8 the pending motions for summary judgment and pending *Daubert* motions, rulings on motions *in*
9 *limine* and other pretrial rulings, and rulings during trial, hearings, and any charge conference.

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PRELIMINARY INSTRUCTIONS

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Duty of Jury²

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

² Ninth Cir. Model Civil Instr. 1.3

[Contested, Competing Proposals] Claims and Defenses

Agreed-to language:

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

This is a lawsuit involving JUUL products. JUUL products are electronic nicotine delivery systems sold under the brand name JUUL. JUUL is manufactured and sold by a company named Juul Labs, Inc., or “JLI.” These are tobacco products that contain nicotine, but are not traditional combustible cigarettes. The products work by the user inhaling, which activates a heating element that in turn converts the nicotine solution in the JUUL pod into an aerosol, which can then be inhaled by the user.

The Plaintiff in this case is the San Francisco Unified School District, also referred to as “SFUSD.” The Defendants in this case are four related companies referred to collectively as “Altria” or the “Altria Defendants.” Those four companies are:

- Altria Group, Inc.;
- Philip Morris USA Inc.;
- Altria Client Services LLC; and
- Altria Group Distribution Company.

Disputed language:

The parties disagree on whether the jury should be informed of the settlement. The parties’ respective proposals are reflected below:

PLAINTIFF’S PROPOSAL

JLI has settled the claims asserted against it and its directors by SFUSD and is not a defendant in this trial. You should not draw any conclusions or inferences of any kind about Altria’s liability from the fact that others have settled. The fact that JLI and individuals associated with JLI are not defendants may not be used by you in any way as evidence against any party to this case.

ALTRIA PROPOSAL

JLI, and individuals associated with JLI, are not defendants in this trial. You should not draw any conclusions or inferences of any kind about Altria's liability from the fact that these parties are not defendants in this trial. The fact that JLI and individuals associated with JLI are not defendants may not be used by you in any way as evidence against any party to this case.

Agreed-to language

Plaintiff brings four claims against Altria. Those are:

- Public nuisance;
- Negligence;
- Violation of the Racketeer Influenced and Corrupt Organizations Act, also known as "RICO"; and
- Conspiracy to violate RICO.

Later I will explain the legal requirements that Plaintiff must prove for these claims.

The Plaintiff has the burden of proving these claims. Altria denies the claims made by SFUSD. Altria contends that it is not liable for any injuries suffered by SFUSD, and also asserts the affirmative defense of failure to mitigate. Altria has the burden of proof on this affirmative defense. Plaintiff denies Altria's affirmative defense.

PLAINTIFF'S POSITION:

The parties agree on the language of this instruction, with one exception: Plaintiff requests that the Court instruct the jury in neutral language that JLI has settled SFUSD's claims against it and its directors. Courts regularly recognize that juries may and should learn the fact that settlement is the reason for a "missing" defendant. *See, e.g., TravelPass Grp., LLC v. Caesars Entm't Corp.*, No. 18-153, 2021 WL 6333018, at *6 (E.D. Tex. Oct. 18, 2021) ("The Court agrees with TravelPass that it should be permitted to provide a limited statement to the jury that the other hotel chains have settled, as an explanation for their absence at the trial."); *Belton v. Fibreboard Corp.* 724 F.2d 500, 504-05 (5th Cir. 1984) (affirming trial court decision to inform the jury that certain asbestos codefendants settled before trial "for the purpose of explaining why those parties were not in court"). *Cf. Coach, Inc. v. Citi Trends, Inc.*, No. 17-4774, 2019 WL 6354367, at *1 (C.D. Cal. Oct. 23, 2019) (excluding fact of settlement because settling party had never been a defendant, and so

1 “empty chair” issue was not presented). It makes sense for the jury to hear that neutral, background
2 fact as part of the Court’s general introduction to the case.

3 Two of the cases Altria cites concerned a settlement (or other litigation resolution) with the
4 actual defendants at trial, not “empty chair” former defendants. *See Whitewater W. Indus., Ltd. v.*
5 *Pac. Surf Designs, Inc.*, No. 17-1118, 2019 WL 2211897, at *4 (S.D. Cal. May 22, 2019) (excluding
6 evidence of prior lawsuits by the plaintiff against the defendants that the defendants said was
7 relevant to show “Plaintiff’s numerous misrepresentations and intentional misconduct directed
8 towards interfering with Defendants’ business practices”); *In re Tesla, Inc. Sec. Litig.*, No. 18-4865,
9 2022 WL 17582008, at *18 (Dec. 7, 2022) (evidence of settlement between SEC and defendants).
10 The only case Altria cites involving former defendants is *RightChoice Managed Car, Inc. v. Hosp.*
11 *Partners, Inc.*, No., 2021 WL 4258748, at *3 (W.D. Mo. Sept. 17, 2021), but that case is
12 distinguishable. The court explained that it reached that result only because the jury would be
13 generally unaware of those former defendants and their role in the tortious scheme. *Id.* at *2 (“The
14 settling Defendants that Plaintiffs seek to inform the jury about settled long before trial; the jury
15 has never seen them so there is no sudden absence at trial that begs for an explanation.”). Here, the
16 jury is going to hear all about the misconduct committed by JLI and the individual defendants and
17 wonder why those defendant are not present.

18 Altria’s position, as expressed in its MIL, is that the jury will not hear anything about why
19 the JLI Defendants are missing, unless and until Altria, in its sole discretion, elects to reveal that
20 fact as part of its examination of a JLI witness. This approach amplifies the unfair prejudice of
21 concealing the fact of settlement from the jury, because it will convey to the jury that *Plaintiff* is
22 responsible for hiding the fact.

23 If the Court instructs the jury as Plaintiff requests (or otherwise denies Altria’s motion in
24 limine to exclude the fact of settlement), Plaintiff does not oppose a jury instruction along the lines
25 of what Altria requests.

26 **ALTRIA’S POSITION:**

27 There is no reason to instruct the jury about the existence of a settlement between Plaintiff
28 and JLI that resulted in the release of JLI and the individual defendants. This information is not

1 necessary to explain to the jury who the defendant at trial will be or to explain which entities or
 2 persons are not defendants at trial. Plaintiff argues that the settlement is a “neutral, background
 3 fact.” To the contrary, telling the jury that JLI settled with Plaintiff would imply to the jury that
 4 JLI engaged in wrongdoing and chose to pay Plaintiff as the result. Because Plaintiff claims that
 5 Altria conducted JLI as a RICO enterprise, the suggestion that JLI engaged in wrongdoing would
 6 implicate Altria as well. This “would likely put doubt in the minds of the jury as to the merits of
 7 the current case” and “have a significant improper influence on the jury’s determination of the
 8 issues in this case.” *Whitewater W. Indus., Ltd. v. Pac. Surf Designs, Inc.*, 2019 WL 2211897, at
 9 *4 (S.D. Cal. May 22, 2019) (internal quotations omitted). For this reason alone, the Court should
 10 decline to add Plaintiff’s proposed instruction regarding settlement. *See, e.g., In re Tesla, Inc. Sec.*
 11 *Litig.*, 2022 WL 17582008, at *18 (N.D. Cal. Dec. 7, 2022) (evidence of settlement “outweighed
 12 by the risk of undue prejudice because a jury could be tempted to find liability.”); *RightCHOICE*
 13 *Managed Care, Inc. v. Hosp. Partners, Inc.*, 2021 WL 4258747, at *3 (W.D. Mo. Sept. 17, 2021)
 14 (excluding evidence of settlement in case involving conspiracy allegations where admitting such
 15 evidence “risks the jury mistakenly inferring that settlements are a concession of liability”).

16 Moreover, if the Court tells the jury that JLI “settled the claims asserted against it and its
 17 directors by SFUSD,” Altria would need to explain the circumstances surrounding the settlement
 18 and the claims and allegations against JLI and the individual defendants. There is no reason to
 19 cross that bridge now when a jury instruction that does not mention the settlement would be equally
 20 sufficient. Plaintiff also mischaracterizes Altria’s motion *in limine* concerning the settlement,
 21 which sensibly asks the Court to preclude Plaintiff from informing the jury about the settlement
 22 without first demonstrating that doing so is necessary. Indeed, it is *Plaintiff* that seeks to have it
 23 both ways, asking the Court to allow Plaintiff to tell the jury that JLI settled the claims against JLI
 24 and the individual defendants, while simultaneously seeking to exclude in its own motion *in limine*
 25 *any* other information concerning the settlement.

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Corporations³

The Altria Defendants in this case are corporations. The fact that a corporation is a party must not influence you in your deliberations or in your verdict. All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

A corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is only responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority. An employee, agent, director, or officer is acting within the scope of authority if he or she is engaged in the performance of duties which were expressly or impliedly assigned to them by the corporation.

³ Ninth Cir. Model Civil Instr. 4.1, 4.2 (modified)

The Altria Defendants⁴

There are four Altria Defendants: Altria Group, Inc.; Philip Morris USA Inc.; Altria Client Services LLC; and Altria Group Distribution Company. The jury instructions and verdict form refer to these entities collectively as “Altria.” You may see evidence that discusses one or more of these Altria Defendants individually. In evaluating the evidence against the Altria Defendants, you should treat these four Defendants as if they are a single Defendant. Your verdict must be the same as to all of the Altria Defendants.

⁴ ECF No. 3468 (signed stipulation re Altria Defendants)

Burden of Proof⁵

When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.

You should base your decision on all of the evidence, regardless of which party presented it.

⁵ Ninth Cir. Model Civil Instr. 1.6

What is Evidence⁶

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn video and live testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I have instructed you to accept as proved.

⁶ Ninth Cir. Model Civil Instr. 1.9

What is Not Evidence⁷

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they will say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you are instructed to disregard, is not evidence and must not be considered. In addition some evidence may be received only for a limited purpose; when I instruct you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

⁷ Ninth Cir. Model Civil Instr. 1.10 (modified)

Evidence for a Limited Purpose⁸

Some evidence may be admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you may consider it only for that limited purpose, but not for any other purpose.

⁸ Ninth Cir. Model Civil Instr. 1.11

Direct and Circumstantial Evidence⁹

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

⁹ Ninth Cir. Model Civil Instr. 1.12

Ruling on Objections¹⁰

There are rules of evidence that control what can and cannot be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

¹⁰ Ninth Cir. Model Civil Instr. 1.14 (modified)

Credibility of Witnesses¹¹

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

¹¹ Ninth Cir. Model Civil Instr. 1.14

Implicit Bias¹²

We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called “implicit” or “unconscious biases.” No matter how unbiased we think we are, our brains are hardwired to make unconscious decisions. We look at others, and filter what they say, through the lens of our own personal experience and background. Because we all do this, we often see life – and evaluate evidence – in a way that tends to favor people who are like ourselves or who have had life experience like our own. We can also have biases about people like ourselves. One common example is the automatic association of male with career and female with family. Bias can affect our thoughts, how we remember what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make important decisions in this case. You must:

1. Take the time you need to reflect carefully and thoughtfully about the evidence.
2. Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds, for example, richer or poorer, more or less educated, older or younger, or of a different gender, gender identity, race, religion, or sexual orientation, would you still view them, and the evidence, the same way?
3. Listen to one another. You must carefully evaluate the evidence and resist and help each other resist any urge to reach a verdict influenced by bias for or against any party or witness. Each of you have different backgrounds and will be viewing this case in light of your own insights, assumptions, and biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.
4. Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or

¹² *Drakeford et al. v. Capital Benefit, Inc. et al.*, No. 3:20-cv-4161, ECF Nos. 113, 128

1 unconscious bias.

2 The law demands that you make a fair decision, based solely on the evidence, your
3 individual evaluations of that evidence, your reason and common sense, and these instructions.

Video Deposition¹³

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

You will be shown video-recorded testimony of certain witnesses. Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

¹³ Ninth Cir. Model Civil Instr. 2.4

Expert Opinion¹⁴

You will hear testimony from expert witnesses, who will testify to opinions and the reasons for their opinions. This opinion testimony is allowed because of the education or experience of these witnesses.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

¹⁴ Ninth Cir. Model Civil Instr. 2.13

Food and Drug Administration

You will hear evidence mentioning the Food and Drug Administration, or “FDA.” The FDA is a federal agency with responsibilities for regulation of tobacco products. Before May 10, 2016, no federal regulations or other requirements applied to the design, development, marketing or sale of JUUL. On May 10, 2016, the FDA issued a rule deeming electronic nicotine delivery systems like JUUL to be tobacco products within FDA’s regulatory authority. The FDA required these products to include a minimum nicotine warning beginning in August 2018. The required statement is: “WARNING: This product contains nicotine. Nicotine is an addictive chemical.” The FDA did not stop manufacturers from including other warnings as well.

Manufacturers of vapor products are required to submit a Premarket Tobacco Application—referred to as a PMTA—seeking FDA authorization to sell their products. When the FDA deemed vapor products like JUUL to be tobacco products in 2016, it permitted existing vapor products, including JUUL, to remain on the market while manufacturers submitted Premarket Tobacco Applications.

JUUL’s PMTA remains pending.

You may hear evidence regarding the standard that FDA applies in deciding whether to authorize a Premarket Tobacco Application, that is, whether to permit a vapor product like JUUL to continue being sold. That standard is referred to as “appropriate for the protection of public health,” or “APPH.” You may consider evidence regarding the appropriate for the protection of public health standard, but it is not the standard you will apply in deciding whether Altria is liable to Plaintiff in this case. Your decision should be guided by all of the evidence in the case and the instructions that I will give you at the end of the case.

Conduct of the Jury¹⁵

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, or computer, or any other electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, Tiktok, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use the Internet or any other resource to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including

¹⁵ Ninth Cir. Model Civil Instr. 1.15

1 the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to
2 read or hear anything touching on this case in the media, turn away and report it to me as soon as
3 possible.

4 These rules protect each party’s right to have this case decided only on evidence that has
5 been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy
6 of their testimony is tested through the trial process. If you do any research or investigation outside
7 the courtroom, or gain any information through improper communications, then your verdict may
8 be influenced by inaccurate, incomplete or misleading information that has not been tested by the
9 trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the
10 case based on information not presented in court, you will have denied the parties a fair trial.
11 Remember, you have taken an oath to follow the rules, and it is very important that you follow
12 these rules. A juror who violates these restrictions jeopardizes the fairness of these proceedings. If
13 any juror is exposed to any outside information, please notify the court immediately.

Publicity During Trial¹⁶

If there is any news media account or commentary about the case or anything to do with it, you must ignore it. You must not read, watch or listen to any news media account or commentary about the case or anything to do with it. You must disable “push notifications” from any news, media, or social media source on your phone. The case must be decided by you solely and exclusively on the evidence that will be received in the case and on my instructions as to the law that applies. If any juror is exposed to any outside information, please notify me immediately.

¹⁶ Ninth Cir. Model Civil Instr. 1.16 (modified)

No Transcript Available to Jury¹⁷

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

¹⁷ Ninth Cir. Model Civil Instr. 1.17

Taking Notes¹⁸

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the jury room. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

¹⁸ Ninth Cir. Model Civil Instr. 1.18

Bench Conferences and Recesses¹⁹

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

¹⁹ Ninth Cir. Model Civil Instr. 1.20

Outline of Trial²⁰

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show.

The plaintiff will then present evidence, and counsel for the defendants may cross-examine. Then the defendants may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

²⁰ Ninth Cir. Model Civil Instr. 1.21 (modified)

FINAL INSTRUCTIONS

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Duty of Jury²¹

Members of the jury: Now that you have heard all of the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be sent to the jury room for you to consult during your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

²¹ Ninth Cir. Model Civil Instr. 1.4

[Contested, Competing Proposals] Claims and Defenses

Agreed-to language:

To help you follow the evidence, I will again give you a brief summary of the positions of the parties:

This is a lawsuit involving JUUL products. JUUL products are electronic nicotine delivery systems sold under the brand name JUUL. JUUL is manufactured and sold by a company named Juul Labs, Inc., or “JLI.” These are tobacco products that contain nicotine, but are not traditional combustible cigarettes. The products work by the user inhaling, which activates a heating element that in turn converts the nicotine solution in the JUUL pod into an aerosol, which can then be inhaled by the user.

The Plaintiff in this case is the San Francisco Unified School District, also referred to as “SFUSD.” The Defendants in this case are four related companies referred to collectively as “Altria” or the “Altria Defendants.” Those four companies are:

- Altria Group, Inc.;
- Philip Morris USA Inc.;
- Altria Client Services LLC; and
- Altria Group Distribution Company.

Disputed language:

The parties disagree on whether the jury should be informed of the settlement. The parties’ respective proposals are reflected below:

PLAINTIFF’S PROPOSAL

JLI has settled the claims asserted against it and its directors by SFUSD and is not a defendant in this trial. You should not draw any conclusions or inferences of any kind about Altria’s liability from the fact that others have settled. The fact that JLI and individuals associated with JLI are not defendants may not be used by you in any way as evidence against any party to this case.

ALTRIA PROPOSAL

JLI, and individuals associated with JLI, are not defendants in this trial. You should not draw any conclusions or inferences of any kind about Altria's liability from the fact that these parties are not defendants in this trial. The fact that JLI and individuals associated with JLI are not defendants may not be used by you in any way as evidence against any party to this case.

Agreed-to language

Plaintiff brings four claims Altria. Those are:

- Public nuisance;
- Negligence;
- Violation of the Racketeer Influenced and Corrupt Organizations Act, also known as "RICO"; and
- Conspiracy to violate RICO.

Later I will explain the legal requirements that Plaintiff must prove for these claims.

The Plaintiff has the burden of proving these claims. Altria denies the claims made by SFUSD. Altria contends that it is not liable for any injuries suffered by SFUSD, and also asserts the affirmative defense of failure to mitigate. Altria has the burden of proof on this affirmative defense. Plaintiff denies Altria's affirmative defense.

PLAINTIFF'S POSITION:

The parties agree on the language of this instruction, with one exception: Plaintiffs requests that the Court instruct the jury in neutral language that JLI has settled SFUSD's claims against it and its directors. Courts regularly recognize that juries may and should learn the fact that settlement is the reason for a "missing" defendant. *See, e.g., TravelPass Grp., LLC v. Caesars Entm't Corp.*, No. 18-153, 2021 WL 6333018, at *6 (E.D. Tex. Oct. 18, 2021) ("The Court agrees with TravelPass that it should be permitted to provide a limited statement to the jury that the other hotel chains have settled, as an explanation for their absence at the trial."); *Belton v. Fibreboard Corp.* 724 F.2d 500, 504-05 (5th Cir. 1984) (affirming trial court decision to inform the jury that certain asbestos codefendants settled before trial "for the purpose of explaining why those parties were not in court"). *Cf. Coach, Inc. v. Citi Trends, Inc.*, No. 17-4774, 2019 WL 6354367, at *1 (C.D. Cal. Oct. 23, 2019) (excluding fact of settlement because settling party had never been a defendant, and so

1 “empty chair” issue was not presented). It makes sense for the jury to hear that neutral, background
2 fact as part of the Court’s general introduction to the case.

3 Two of the cases Altria cites concerned a settlement (or other litigation resolution) with the
4 actual defendants at trial, not “empty chair” former defendants. *See Whitewater W. Indus., Ltd. v.*
5 *Pac. Surf Designs, Inc.*, No. 17-1118, 2019 WL 2211897, at *4 (S.D. Cal. May 22, 2019) (excluding
6 evidence of prior lawsuits by the plaintiff against the defendants that the defendants said was
7 relevant to show “Plaintiff’s numerous misrepresentations and intentional misconduct directed
8 towards interfering with Defendants’ business practices”); *In re Tesla, Inc. Sec. Litig.*, No. 18-4865,
9 2022 WL 17582008, at *18 (Dec. 7, 2022) (evidence of settlement between SEC and defendants).
10 The only case Altria cites involving former defendants is *RightChoice Managed Car, Inc. v. Hosp.*
11 *Partners, Inc.*, No., 2021 WL 4258748, at *3 (W.D. Mo. Sept. 17, 2021), but that case is
12 distinguishable. The court explained that it reached that result only because the jury would be
13 generally unaware of those former defendants and their role in the tortious scheme. *Id.* at *2 (“The
14 settling Defendants that Plaintiffs seek to inform the jury about settled long before trial; the jury
15 has never seen them so there is no sudden absence at trial that begs for an explanation.”). Here, the
16 jury is going to hear all about the misconduct committed by JLI and the individual defendants and
17 wonder why those defendant are not present.

18 Altria’s position, as expressed in its MIL, is that the jury will not hear anything about why
19 the JLI Defendants are missing, unless and until Altria, in its sole discretion, elects to reveal that
20 fact as part of its examination of a JLI witness. This approach amplifies the unfair prejudice of
21 concealing the fact of settlement from the jury, because it will convey to the jury that *Plaintiff* is
22 responsible for hiding the fact.

23 If the Court instructs the jury as Plaintiff requests (or otherwise denies Altria’s motion in
24 limine to exclude the fact of settlement), Plaintiff does not oppose a jury instruction along the lines
25 of what Altria requests.

26 **ALTRIA’S POSITION**

27 There is no reason to instruct the jury about the existence of a settlement between Plaintiff
28 and JLI that resulted in the release of JLI and the individual defendants. This information is not

1 necessary to explain to the jury who the defendant at trial will be or to explain which entities or
 2 persons are not defendants at trial. Plaintiff argues that the settlement is a “neutral, background
 3 fact.” To the contrary, telling the jury that JLI settled with Plaintiff would imply to the jury that
 4 JLI engaged in wrongdoing and chose to pay Plaintiff as the result. Because Plaintiff claims that
 5 Altria conducted JLI as a RICO enterprise, the suggestion that JLI engaged in wrongdoing would
 6 implicate Altria as well. This “would likely put doubt in the minds of the jury as to the merits of
 7 the current case” and “have a significant improper influence on the jury’s determination of the
 8 issues in this case.” *Whitewater W. Indus., Ltd. v. Pac. Surf Designs, Inc.*, 2019 WL 2211897, at
 9 *4 (S.D. Cal. May 22, 2019) (internal quotations omitted). For this reason alone, the Court should
 10 decline to add Plaintiff’s proposed instruction regarding settlement. *See, e.g., In re Tesla, Inc. Sec.*
 11 *Litig.*, 2022 WL 17582008, at *18 (N.D. Cal. Dec. 7, 2022) (evidence of settlement “outweighed
 12 by the risk of undue prejudice because a jury could be tempted to find liability.”); *RightCHOICE*
 13 *Managed Care, Inc. v. Hosp. Partners, Inc.*, 2021 WL 4258747, at *3 (W.D. Mo. Sept. 17, 2021)
 14 (excluding evidence of settlement in case involving conspiracy allegations where admitting such
 15 evidence “risks the jury mistakenly inferring that settlements are a concession of liability”).

16 Moreover, if the Court tells the jury that JLI “settled the claims asserted against it and its
 17 directors by SFUSD,” Altria would need to explain the circumstances surrounding the settlement
 18 and the claims and allegations against JLI and the individual defendants. There is no reason to
 19 cross that bridge now when a jury instruction that does not mention the settlement would be equally
 20 sufficient. Plaintiff also mischaracterizes Altria’s motion *in limine* concerning the settlement,
 21 which sensibly asks the Court to preclude Plaintiff from informing the jury about the settlement
 22 without first demonstrating that doing so is necessary. Indeed, it is *Plaintiff* that seeks to have it
 23 both ways, asking the Court to allow Plaintiff to tell the jury that JLI settled the claims against JLI
 24 and the individual defendants, while simultaneously seeking to exclude in its own motion *in limine*
 25 *any* other information concerning the settlement.

Corporations²²

The Altria Defendants in this case are corporations. The fact that a corporation is a party must not influence you in your deliberations or in your verdict. All parties are equal before the law, and a corporation is entitled to the same fair and conscientious consideration by you as any party.

A corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is only responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority. An employee, agent, director, or officer is acting within the scope of authority if he or she is engaged in the performance of duties which were expressly or impliedly assigned to that person by the corporation.

²² Ninth Cir. Model Civil Instr. 4.1, 4.2 (modified)

The Altria Defendants²³

There are four Altria Defendants: Altria Group, Inc.; Philip Morris USA Inc.; Altria Client Services LLC; and Altria Group Distribution Company. The jury instructions and verdict form refer to these entities collectively as “Altria.” You have seen evidence that discusses one or more of these Altria Defendants individually. In evaluating the claims against the Altria Defendants, you should treat these four Defendants as if they are a single Defendant. Your verdict must be the same as to all of the Altria Defendants.

²³ Doc. 3468 (signed stipulation re Altria Defendants)

What is Evidence²⁴

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn video and live testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I have instructed you to accept as proved.

²⁴ Ninth Cir. Model Civil Instr. 1.9

What is Not Evidence²⁵

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

²⁵ Ninth Cir. Model Civil Instr. 1.10 (modified)

Evidence for a Limited Purpose²⁶

Some evidence may have been admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

²⁶ Ninth Cir. Model Civil Instr. 1.11 (modified)

Direct and Circumstantial Evidence²⁷

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

²⁷ Ninth Cir. Model Civil Instr. 1.12

Credibility of Witnesses²⁸

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

²⁸ Ninth Cir. Model Civil Instr. 1.14

Implicit Bias²⁹

We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called “implicit” or “unconscious biases.” No matter how unbiased we think we are, our brains are hardwired to make unconscious decisions. We look at others, and filter what they say, through the lens of our own personal experience and background. Because we all do this, we often see life – and evaluate evidence – in a way that tends to favor people who are like ourselves or who have had life experience like our own. We can also have biases about people like ourselves. One common example is the automatic association of male with career and female with family. Bias can affect our thoughts, how we remember what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make important decisions in this case. You must:

1. Take the time you need to reflect carefully and thoughtfully about the evidence.
2. Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds, for example, richer or poorer, more or less educated, older or younger, or of a different gender, gender identity, race, religion, or sexual orientation, would you still view them, and the evidence, the same way?
3. Listen to one another. You must carefully evaluate the evidence and resist and help each other resist any urge to reach a verdict influenced by bias for or against any party or witness. Each of you have different backgrounds and will be viewing this case in light of your own insights, assumptions, and biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.
4. Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or

²⁹ *Drakeford et al. v. Capital Benefit, Inc. et al.*, No. 3:20-cv-4161, ECF Nos. 113, 128

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unconscious bias.

The law demands that you make a fair decision, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions.

Video Depositions³⁰

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

You have been shown video-recorded testimony of certain witnesses. Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

³⁰ Ninth Cir. Model Civil Instr. 2.4

Taking Notes³¹

You may have taken notes to help you remember the evidence. If you did take notes, please keep them to yourself until you go to the jury room to decide the case. When you leave, your notes should be left in the jury room. No one will read your notes.

Whether or not you took notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

³¹ Ninth Cir. Model Civil Instr. 1.18 (modified)

Expert Opinion³²

You have heard testimony from expert witnesses, who testified to opinions and the reasons for their opinions. This opinion testimony was allowed because of the education or experience of these witnesses.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

³² Ninth Cir. Model Civil Instr. 2.13

Charts and Summaries Not Received in Evidence³³

Certain charts and summaries not admitted into evidence have been shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

³³ Ninth Cir. Model Civil Instr. 2.14

Charts and Summaries Received in Evidence³⁴

Certain charts and summaries have been admitted into evidence to illustrate information brought out in the trial. These charts and summaries were admitted to prove the content of voluminous materials that cannot be conveniently examined in court, and as such, you should treat these charts and summaries as you would any other evidence. However, charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

³⁴ Ninth Cir. Model Civil Instr. 2.15 (modified)

Burden of Proof³⁵

When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.

You should base your decision on all of the evidence, regardless of which party presented it.

³⁵ Ninth Cir. Model Civil Instr. 1.6, 1.7

1 **[Contested, Altria-Proposed] Harm Caused by Other Vapor Products**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s allegations are based on JUUL products. Altria is not liable for injuries or harm
4 that resulted from any other vapor products manufactured by any other company.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is consistent with the causation requirement that Plaintiff must
7 meet to establish each of the Plaintiff’s claims. *See, e.g., City & Cnty. of San Francisco v. Purdue*
8 *Pharma L.P.*, 491 F. Supp. 3d 610, 676 (N.D. Cal. 2020) (“A plaintiff must prove factual causation,
9 which requires proving that a defendant’s conduct was a substantial factor in bringing about the
10 nuisance. Additionally, a plaintiff must establish that the defendant’s wrongful conduct was not
11 too remote from the current hazard to be its legal cause, i.e., proximate causation.”) (internal cites
12 omitted); *Union Pac. R.R. Co. v. Ameron Pole Prods., LLC*, 43 Cal. App. 5th 974, 980 (2019) (“To
13 prove causation, the plaintiff must show: (1) that the defendant’s breach of duty was a cause in fact
14 of his or her injury; and (2) that the defendant’s breach was the proximate, or legal, cause of the
15 injury.”); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (RICO requires proximate
16 causation). To the extent that Plaintiff seeks to impose liability based on injuries or harm that was
17 caused by other vapor products, any connection between the Plaintiff’s alleged harm and Altria’s
18 conduct would be too remote and indirect to establish proximate causation. *See, e.g., Hemi Grp.,*
19 *LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010) (proximate causation requires “some direct relation
20 between the injury asserted and the injurious conduct alleged” and cannot be “too remote, purely
21 contingent, or indirect”) (citations and quotations omitted). Moreover, vapor products were
22 available and being used before JUUL products were introduced. Plaintiff’s argument that it plans
23 to offer evidence and ask the jury to impose liability based on “‘copycat’ products such as ‘Puff
24 Bar’” only confirms that this instruction is necessary to ensure that the jury does not award damages
25 for harm that could not have been caused by Altria.

26 **PLAINTIFF’S POSITION:**

27 Plaintiff objects to Altria’s proposed instruction as legally and factually inaccurate. Altria
28 is liable for the foreseeable consequences of its actions. *In re JUUL Labs, Inc., Mktg., Sales Pracs.,*

1 & *Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 664-65 (N.D. Cal. 2020) (holding that intervening acts
2 do not break the chain of causation if they are foreseeable). Here, Plaintiff's proof will show that
3 the JUUL-caused and Altria-abetted youth vaping epidemic in later stages manifested through
4 "copycat" products such as "Puff Bar." *E.g.*, Cutler 9/0/21 Rpt. at 51-54; Halpern-Felsher SFUSD
5 Rpt. at 66-67 (discussing similarities between JUUL and Puff Bar); Prochaska 9/20/21 Rpt. at 34-
6 35 (same). Thus, the jury should decide whether it was foreseeable that Altria's contribution to a
7 youth vaping epidemic would lead to harm to SFUSD from the general use of ENDS products,
8 including but not limited to JUUL products.

9 Altria's citations simply address general principles of law indicating that there must be a
10 connection between a defendant's actions and the harm. That concept is addressed by the pattern
11 instructions regarding causation.

1 **[Contested, Altria-Proposed] Investment Not Grounds for Liability**

2 **ALTRIA’S PROPOSAL:**

3 It is not a violation of the law to invest in, or own stock in, a corporation. Moreover, mere
4 investment and/or ownership of corporate stocks does not make the investor liable for the actions
5 of the corporation that received the investment. Therefore, Plaintiff cannot establish claims against
6 Altria based on the mere fact that Altria invested in or owned stock in JLI.

7 **ALTRIA’S POSITION:**

8 This instruction accurately states the law. *See, e.g., Dole Food Co. v. Patrickson*, 538 U.S.
9 468, 474 (2003) (holding that a shareholder does not acquire ownership over a company or its assets
10 by virtue of owning that company’s shares); *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998)
11 (shareholders are not liable absent exceptional circumstances such as misuse of the corporate form);
12 *AV Media Pte. Ltd. v. Promounts*, 2008 WL 11337209, at *6 (C.D. Cal. July 1, 2008) (refusing to
13 hold shareholders personally liable despite plaintiff’s allegations that the corporation was merely
14 the alter ego of those shareholders); 114 Am. Jur. Proof of Facts 3d 403 (“A fundamental principle
15 of Anglo-American law is that a business operating as a legally recognized entity is separate and
16 distinct from its owners. . . . The corporate form was created to allow shareholders to invest without
17 incurring personal liability for the acts of the corporation.”).

18 This instruction is also necessary and appropriate given Plaintiff’s allegations and theories
19 of liability in this case. For example, Plaintiff intends to present evidence that Altria purchased a
20 35% interest in JLI in December 2018. This instruction is needed to make clear to the jury that
21 Altria’s investment in a separate corporation such as JLI is not grounds for imposing liability
22 against Altria. Without such an instruction, this limitation will not be obvious to and might not be
23 understood by the jury.

24 Plaintiff’s position proposes additional language that the Court should include if it gives
25 Altria’s proposed instruction. The specific language proposed by Plaintiff, however, would
26 incorrectly and improperly suggest to the jury that Altria’s investment can be the basis of
27 liability. Accordingly, to the extent the Court believes that some additional language should be
28 included in Altria’s proposed instruction, Altria submits that the following language should be used

1 instead:

2 While you may consider evidence that Altria invested in JLI in considering
3 Plaintiff's claims and Altria's defenses, you may not find liability based solely on
4 Altria's investment in JLI.

5 This language would be sufficient to address any concerns Plaintiff has and is more consistent with
6 governing authority than the additional language Plaintiff proposes.

7 **PLAINTIFF'S POSITION:**

8 Investments can trigger liability if the elements of a claim are met, and can be relevant
9 evidence of knowledge and intent regardless. None of Altria's cited authorities state that a party
10 may never be held liable based on an investment.

11 If this instruction is given, Plaintiff requests the following language be included:

12 While Plaintiff cannot establish claims against Altria based on nothing more than
13 the fact Altria that invested in JLI, the fact that Altria invested in JLI may support
14 one or more of Plaintiff's claims in light of other facts that were proven during trial.

15 Altria's argument also reveals why this instruction would be confusing to the jury. Plaintiff
16 does not intend to argue that Altria should be held liable solely because of its investment in JLI,
17 but that investment (and the potential for it beginning in 2017) is part of the evidence as to how
18 Altria was able to play some part in directing the affairs of JLI. *See Reves v. Ernst & Young*, 507
19 U.S. 170, 179 (1993). In addition, the investment, by contributing to Altria's influence over JLI,
20 supports Plaintiff's negligence and nuisance claims, and provides factual support for the showings
21 of knowledge and intent in support of those claims. Altria's proposed instruction could confuse the
22 jury into believing that they could not consider the investment for any purpose, when it is relevant
23 to important issues in the case.

1 **[Contested, Competing Proposals] Right to Petition the Government**

2 **PLAINTIFF'S PROPOSAL:**

3 The Altria Defendants have the right under the First Amendment to the United States
 4 Constitution to petition, provide information, and express their views to their government on issues
 5 of policy and legislation concerning e-vapor use and health. Advocacy efforts, government
 6 submissions, and similar communications with the government are protected by the First
 7 Amendment to the United States Constitution. However, there is no First Amendment right to make
 8 intentional misrepresentations in an attempt to mislead a federal regulatory agency. Accordingly,
 9 while you may not base any findings of liability on any genuine petitioning or lobbying effort, you
 10 may base findings of liability on the communication of intentionally false information to the
 11 government. In addition, whether or not petitioning or lobbying was truthful or false, you may
 12 consider such efforts as evidence of a defendant's knowledge, motive, and intent.

13 **ALTRIA'S PROPOSAL:**

14 Altria has the right under the First Amendment to the United States Constitution to petition,
 15 provide information, and express its views to the government on issues of policy and legislation
 16 concerning vapor product use and health. Advocacy efforts, government submissions, and similar
 17 communications with the government are protected by the First Amendment to the United States
 18 Constitution. You may not base any findings of liability on any petitioning or lobbying effort of
 19 Altria or on any statements made by Altria to any federal, state, or local legislative, executive, or
 20 regulatory body, including Congress. In addition, you may not impose liability on Altria based upon
 21 an attempt to influence government action or to influence the passage or enforcement of laws or
 22 adoption of federal regulatory policies.

23 **PLAINTIFF'S POSITION:**

24 Plaintiff's proposed instruction is an accurate statement of the law. Conversely, Altria's
 25 instruction treats *Noerr-Pennington* immunity as absolute and fails to acknowledge that fraud on
 26 and adjudicatory body is not protected conduct. *See, e.g., Kottle v. Nw. Kidney Ctrs.*, 146 F.3d
 27 1056, 1060-62 (9th Cir. 1998) (sham exception applies where defendant engages in intentional
 28 fraud on an administrative agency acting in an adjudicatory capacity); *Clipper Express v. Rocky*

1 *Mtn. Motor Tariff Bur., Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) (“[T]he supplying of fraudulent
 2 information thus threatens the fair and impartial functioning of these agencies and does not deserve
 3 immunity from the antitrust laws.”). Accordingly, whether Altria’s conduct triggers liability is a
 4 jury question. *In re JUUL*, 497 F. Supp. 3d 552, 613-14 (N.D. Cal. 2020); *In re Juul*, No. 19-2913,
 5 2022 WL 1601418, at *3-6, 18-19 (N.D. Cal. Apr. 22, 2022). The instruction also fails to recognize
 6 that lobbying activity may be relevant as to Altria’s knowledge, motive, and intent. *See JUUL*, 497
 7 F. Supp. 3d at 614-15.

8 The Court should reject the argument that the sham exception is inapplicable simply
 9 because Altria genuinely sought to influence the government—as this Court already recognized.
 10 *JUUL Labs*, 497 F. Supp. 3d at 614 (“Whether or not an otherwise non-actionable statement falls
 11 within the sham exception is generally a question of fact not appropriate for resolution on a motion
 12 to dismiss.”). Finally, as the Court also recognized, “even if the representations to Congress and
 13 the FDA are not actionable as predicate acts, they are nonetheless evidence of the alleged overall
 14 scheme to defraud.” *Id.*

15 **ALTRIA’S POSITION:**

16 The *Noerr-Pennington* doctrine is based on the First Amendment right to petition the
 17 government and protects lobbying activities, efforts to petition the government, conduct in the
 18 defense of litigation, and the expression of scientific opinions. *See, e.g., United Mine Workers of*
 19 *Am. v. Pennington*, 381 U.S. 657, 670 (1965) (holding efforts to influence public officials are not
 20 illegal, “regardless of intent or purpose”). As the Court held in *United Mine Workers*, the jury
 21 should be informed that efforts to influence public officials are not illegal, “regardless of intent or
 22 purpose.” *Id.* Plaintiff contends that Altria is liable for various statements and representations made
 23 that are subject to these protections. This necessitates an instruction explaining Altria’s First
 24 Amendment rights.

25 Ample case law supports the inclusion of a jury instruction explaining Altria’s First
 26 Amendment rights. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380
 27 (1991) (holding defendants are immune from liability for seeking government action, even if
 28 defendants use “improper means” to do so); *E.R.R. Presidents Conf. v. Noerr Motors Freight, Inc.*,

365 U.S. 127, 145 (1961) (Defendant could not be held liable for an “attempt to bring about the passage of laws that would help it or injure the other,” even if it “deliberatively deceived the public and public officials”); *Cheminor Drugs Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3d Cir. 1999) (“[T]he same First Amendment principles on which *Noerr-Pennington* immunity is based apply to [state] tort claims.”); *Senart v. Mobay Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984) (“In short, plaintiffs assail Defendant for taking a particular view in a scientific debate and for trying to retain a regulatory standard which defendants preferred. Not only do these actions not constitute torts, they are protected by the first amendment.”) (citing *Noerr*); *see also, e.g.*, Sept. 17, 2018 Trial Tr. at 3087, *In re: Engle Progeny Cases Tobacco Litig. (Simon)*, Case No. 07-CV-27976 (09) (Fla. 17th Cir. Ct.); Jan. 31, 2018 Trial Tr. at 3638, *In re: Engle Progeny Cases Tobacco Litig. (Schlefstein)*, No. 08-22558 (19) (Fla. 17th Cir. Ct.) (giving substantially similar instruction); Nov. 21, 2017 Trial Tr. at 3153-54, *In re: Engle Progeny Cases Tobacco Litig. (Adamson)*, No. 50 2016 CA 008532 MB (Fla. 15th Cir.) (giving similar instruction); Jul. 27, 2017 Trial Tr. at 2343-44, *In re: Engle Progeny Cases Tobacco Litig. (Thomas)*, No. 2007-CV036432 (19) (Fla. 17th Cir.) (giving similar instruction); Nov. 9, 2016 Trial Tr. at 2873-74, *In re: Engle Progeny Cases Tobacco Litig. (Howles II)*, No. 2007-CV-034919 (Fla. 17th Cir.) (giving similar instruction); Oct. 21, 2016 Trial Tr. at 3411-12, *In re: Engle Progeny Cases Tobacco Litig. (Konzelman)*, No. 2008-CV-019620 (19) (Fla. 17th Cir.) (giving similar instruction) (collectively attached as Altria Ex. A).

In addition, contrary to Plaintiff’s argument, there is no reason to refer to the sham doctrine in this instruction since, as the Court previously noted, “Plaintiffs *concede* that JLI and Altria genuinely sought to influence the government [in its October 25, 2018 letter] (to defer regulation and allow them to keep JLI’s mint pods on the market), even if the information they used to achieve those ends was fraudulent.” *JUUL Labs*, 497 F. Supp. 3d at 614 (emphasis in original); *see also, e.g., Blank v. Kirwan*, 39 Cal. 3d 311, 324 (1985) (“For the purposes of the *Noerr-Pennington* doctrine, . . . impropriety and genuineness are not related. Indeed, not only were defendants’ efforts genuine, they were also successful—and as such incapable of being deemed a mere sham.”).

Furthermore, contrary to Plaintiff’s proposed instruction, allegedly false statements are also protected by the *Noerr-Pennington* doctrine. *See, e.g., E.R.R. Presidents Conf. v. Noerr Motor*

1 *Freight, Inc.*, 365 U.S. 127, 145 (1961) (defendant could not be liable for “attempt[ing] to bring
 2 about the passage of laws” even if it “deliberatively deceived the public and public officials”);
 3 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) (similar); *Cal.*
 4 *Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (“[M]isrepresentations” are
 5 “condoned in the political arena”); *Davric Maine Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir.
 6 2000) (“Even *false* statements presented to support such petitions [to the government] are
 7 protected.”) (emphasis in original). Under the *Noerr-Pennington* doctrine, courts must “avoid
 8 burdening conduct that implicates the protections afforded by the Petition Clause *unless [a] statute*
 9 *clearly provides otherwise.*” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (emphasis
 10 added). Three Circuits—the Ninth in *Sosa* along with the Third and Tenth—have thus held that
 11 “[t]he remedy for” false statements to the government “rests with laws addressed to it and not with
 12 courts looking behind sovereign state action” at the behest of private plaintiffs. *Armstrong Surgical*
 13 *Ctr., Inc. v. Armstrong Cnty. Mem’l Hosp.*, 185 F.3d 154, 157 (3d Cir. 1999); *Coll v. First Am. Title*
 14 *Ins. Co.*, 642 F.3d 876, 899 (10th Cir. 2011) (same); *see also Sosa*, 437 F.3d at 932-42 (applying
 15 *Noerr-Pennington* to hold that pre-suit demand letters that included allegedly legally and factually
 16 false statements were not actionable under several state and federal fraud statutes). None of the
 17 statutes under which Plaintiff has brought claims in this case “clearly provide” for liability on the
 18 basis of statements to the government as required to give rise to liability under *Sosa* and *Noerr-*
 19 *Pennington*. *Sosa*, 437 F.3d at 931 & n.5. As a consequence, these statutes cannot be construed to
 20 permit the imposition of liability on Altria on the basis of its statements to the government. *See*
 21 *Sosa*, 437 F.3d at 942; *see also Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644-46 (9th Cir.
 22 2009) (applying *Sosa*’s framework and explaining that alleged “misrepresent[at]ions” are still
 23 protected petitioning conduct).

24 Accordingly, Altria objects to the following portion of the Plaintiff’s proposal as contrary
 25 to the law, incomplete, potentially confusing and prejudicial: “However, there is no First
 26 Amendment right to make intentional misrepresentations in an attempt to mislead a federal
 27 regulatory agency or as part of sworn testimony to Congress. Accordingly, while you may not base
 28 any findings of liability on any genuine petitioning or lobbying effort, you may base findings of

1 liability on the communication of intentionally false information to the government. In addition,
2 whether or not petitioning or lobbying was truthful or false, you may consider such efforts as
3 evidence of a defendant's knowledge, motive, and intent."

1 **[Contested, Altria-Proposed] Right to Petition the Government – False Statements**

2 **ALTRIA’S PROPOSAL:**

3 Altria’s right under the First Amendment to petition, provide information, and express its
4 views to the government extends to and protects statements even if the statements in question were
5 false or misleading.

6 **ALTRIA’S POSITION:**

7 The right to petition the government protected by the *Noerr-Pennington* doctrine and First
8 Amendment protects from liability false statements made during petitioning activity. *See, e.g.,*
9 *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961) (defendant could
10 not be liable for “attempt[ing] to bring about the passage of laws” even if it “deliberatively deceived
11 the public and public officials”); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492,
12 499-500 (1988) (similar); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)
13 (“[M]isrepresentations” are “condoned in the political arena”); *Davric Maine Corp. v. Rancourt*,
14 216 F.3d 143, 147 (1st Cir. 2000) (“Even *false* statements presented to support such petitions [to
15 the government] are protected.”) (emphasis in original). Under the *Noerr-Pennington* doctrine,
16 courts must “avoid burdening conduct that implicates the protections afforded by the Petition
17 Clause *unless [a] statute clearly provides otherwise.*” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929
18 (9th Cir. 2006) (emphasis added). Three Circuits—the Ninth in *Sosa* along with the Third and
19 Tenth—have thus held that “[t]he remedy for” false statements to the government “rests with laws
20 addressed to it and not with courts looking behind sovereign state action” at the behest of private
21 plaintiffs. *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem’l Hosp.*, 185 F.3d 154, 157 (3d
22 Cir. 1999); *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 899 (10th Cir. 2011) (same); *see also*
23 *Sosa*, 437 F.3d at 932-42 (applying *Noerr-Pennington* to hold that pre-suit demand letters that
24 included allegedly legally and factually false statements were not actionable under several state and
25 federal fraud statutes). None of the statutes under which Plaintiff has brought claims in this case
26 “clearly provide” for liability on the basis of statements to the government as required to give rise
27 to liability under *Sosa* and *Noerr-Pennington*. *Sosa*, 437 F.3d at 931 & n.5. As a consequence,
28 these statutes cannot be construed to permit the imposition of liability on Altria on the basis of its

1 statements to the government. *See Sosa*, 437 F.3d at 942; *see also Kearney v. Foley & Lardner,*
 2 *LLP*, 590 F.3d 638, 644-46 (9th Cir. 2009) (applying *Sosa*'s framework and explaining that alleged
 3 "misrepresent[at]ions" are still protected petitioning conduct).

4 This instruction is also necessary and appropriate given Plaintiff's allegations and theories
 5 of liability, which rely in part on communications between Altria and the government as the basis
 6 for liability. Plaintiff has argued that *Noerr-Pennington* doctrine does not apply to false statements.
 7 *See, e.g.,* Hr'g Tr. at 64 (Feb. 16, 2022). This instruction is therefore necessary to prevent juror
 8 confusion about whether and to what extent Altria's communications with and statements to the
 9 government can form the basis of Plaintiff's claims.

10 **PLAINTIFF'S POSITION:**

11 As explained in Plaintiff's Position on the previous disputed *Noerr-Pennington* instruction,
 12 Altria's instruction is an incorrect statement of the law. Liability may be based on fraudulent
 13 statement made to administrative agencies acting in an adjudicatory role. *See, e.g., Kottle v. Nw.*
 14 *Kidney Ctrs.*, 146 F.3d 1056, 1060-62 (9th Cir. 1998); *Clipper Express v. Rocky Mtn. Motor Tariff*
 15 *Bur., Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982). And such conduct may be evidence of knowledge,
 16 motive, intent, or of the fraudulent scheme in any event.

17 The instruction also fails to recognize that lobbying activity may be relevant as to Altria's
 18 knowledge, motive, and intent. *See JUUL*, 497 F. Supp. 3d at 614-15.

1 **[Contested, Altria-Proposed] Retailer Duty to Verify Age**

2 **ALTRIA’S PROPOSAL:**

3 The responsibility for requesting proof of age at a physical place of purchase (like a gas
4 station or convenience store) falls on the third-party retailer running that gas station or convenience
5 store. Retailers have a legal duty not to sell tobacco and vapor products to underage individuals.

6 **ALTRIA’S POSITION:**

7 Plaintiff claims that Altria was negligent when distributing JUUL products for sale at retail
8 and that negligence caused Plaintiff’s injuries. The reasonableness of Altria’s conduct when
9 distributing JUUL to retail locations or providing retail services therefore depends on the extent to
10 which there were restrictions in place at retail locations to prevent underage individuals from
11 obtaining JUUL products. In addition, the extent to which underage users could obtain JUUL at
12 retail locations is relevant to causation. It is therefore critical that the jury be informed that retailers
13 are prohibited from selling JUUL to underage individuals and are required to verify consumers’
14 age before selling them JUUL and that California has several other requirements in place to restrict
15 youth access to vapor products. *See, e.g.*, Cal. Penal Code § 308(A)(1)(a) (allowing criminal or
16 civil action and fines against persons or corporations selling tobacco products to anyone under 21);
17 Cal. Bus. & Prof. Code § 22958(a) (allowing civil penalties against persons and businesses that
18 sell, give, or furnish tobacco or instruments designed to ingest tobacco to anyone under 21 years;
19 authorizing license suspension or revocation); *id.* § 22956 (requiring retailers to check
20 identification of tobacco purchasers); *id.* § 22972 (detailing license requirements for tobacco
21 retailers); *id.* § 22980 (authorizing inspections). Plaintiff’s argument that the proposed instruction
22 “implies that retailers have the sole responsibility to prevent underage use” is incorrect. The
23 instruction is expressly limited to responsibilities at retail locations and is legally and factually
24 accurate when discussing those responsibilities.

25 **PLAINTIFF’S POSITION:**

26 Plaintiff objects to the proposed instruction as irrelevant, lacking a factual basis, and likely
27 to confuse the jury. The proposed instruction regarding retailers’ duties is irrelevant because
28 SFUSD’s claim does not depend on the manner in which students obtained JUUL products. *See*

1 *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (“[W]hether an instruction should be
2 given in the first place depends on the theories and evidence presented at trial. This is mostly a
3 factual inquiry, but not entirely. It also requires judgment as to whether the proposed instruction is
4 relevant to the issues presented or would unduly confuse the jury.”). Because there is no factual
5 basis for the instruction, it is likely to confuse the jury as to the relevant issues. In particular, the
6 allegation that unnamed non-parties, who are not before the Court, committed a crime is likely to
7 distract the jury from the evidence relevant to its determinations.

8 The instruction also lacks a factual basis for relevance. Altria cannot identify any retailers
9 who allegedly broke the law or to what extent.

10 Finally, the proposed instruction is legally incorrect because it implies that retailers have
11 the sole responsibility to prevent underage use, such that other entities cannot be assigned such
12 responsibility.

[Contested, Competing Proposals] Public Nuisance – Essential Factual Elements [Plaintiff’s Proposal] / Public Nuisance – Introduction [Altria’s Proposal]

PLAINTIFF’S PROPOSAL:

Plaintiff’s first claim is public nuisance. Plaintiff claims that it suffered harm because Altria contributed to a nuisance that exists within SFUSD’s schools. A public nuisance is a substantial and unreasonable interference with a public right. An interference is substantial if it causes significant harm. An interference is unreasonable if its social utility is outweighed by the gravity of the harm inflicted. To establish this claim, SFUSD must prove that youth e-cigarette use is a public nuisance within SFUSD’s schools, and that Altria is liable for the nuisance. To find for the Plaintiff on these issues, you must find all of the following:

1. That Altria, by acting or failing to act, created a condition or permitted a condition to exist that is harmful to health, is indecent or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;
2. That Altria had knowledge that its conduct would create a condition harmful to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;
3. That the condition affects a substantial number of people at the same time;
4. That an ordinary person would be reasonably annoyed or disturbed by the condition;
5. That the seriousness of the harm outweighs the social utility of Altria’s conduct;
6. That SFUSD did not consent to Altria’s conduct;
7. That SFUSD’s property was injuriously affected, or its personal enjoyment was lessened by the nuisance; and
8. That Altria’s conduct was a substantial factor in causing SFUSD’s harm.

ALTRIA’S PROPOSAL:

Plaintiff’s first claim is public nuisance. A public nuisance is a substantial and unreasonable interference with a public right. An interference is substantial if it causes significant harm. An interference is unreasonable if its social utility is outweighed by the gravity of the harm inflicted. Plaintiff claims that it suffered harm because Altria’s JUUL-related conduct knowingly created a

1 substantial and unreasonable interference with a public right by creating a youth e-cigarette public
2 health crisis in SFUSD's schools.

3 To establish its public nuisance claim, SFUSD must prove each of the following elements
4 by a preponderance of the evidence:

5 1. That Altria, by an unreasonable act, created a condition or permitted a condition to
6 exist that was harmful to health;

7 2. That Altria had knowledge that its unreasonable conduct would create a condition
8 harmful to health;

9 3. That Altria had a duty to take action to prevent or abate the condition harmful to
10 public health;

11 4. That the condition affected a substantial number of people at the same time;

12 5. That an ordinary person would be reasonably annoyed or disturbed by the condition;

13 6. That the seriousness of the harm created by Altria's conduct outweighs the social
14 utility and benefits derived from Altria's conduct;

15 7. That SFUSD did not consent to Altria's conduct;

16 8. That SFUSD's property was injuriously affected by the nuisance; and

17 9. That Altria's conduct was a substantial factor in causing SFUSD's harm.

18 I will describe these elements in more detail now.

19 **PLAINTIFF'S POSITION:**

20 Plaintiff's proposed instruction reflects the California pattern instruction (CACI 2020). *See*
21 *Dep't of Fish & Game v. Sup. Ct.*, 197 Cal. App. 4th 1323, 1352 (2011) (relying on the pattern
22 instruction); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1548 (2009) (same). The
23 pattern has been modified (1) to reflect the need to find a currently-existing nuisance; (2) to include
24 a knowledge element; and (3) to include the Section 731 standing requirement of injury to property.
25 *See City and County of San Francisco v. Purdue Pharma L.P.*, 18-07591, 2022 WL 3224463, at
26 *53 (N.D. Cal. Aug. 10, 2022) ("The Court does not decide whether California law incorporates an
27 actual knowledge requirement because the facts proved at trial satisfy the actual knowledge
28 requirement."); Cal. Civ. Proc. Code § 731 ("An action may be brought by any person whose

1 property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined
 2 in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined
 3 or abated as well as damages recovered therefor.”).

4 Altria’s alternative instruction should be rejected.

5 *First*, Altria’s argument that § 731 does not permit a claim when personal enjoyment is
 6 lessened ignores the plain language of the statutory text. Altria’s argument that Plaintiff’s
 7 instruction is inconsistent with the complaint is also incorrect. SFUSD Amended Complaint, ECF
 8 9, at 225 (listing the three relevant prongs of public nuisance, including “indecent or offensive to
 9 the senses”).

10 *Second*, Altria’s proposed duty element should be rejected. A duty of care is not an element
 11 of a public nuisance claim, at least not one premised on allegations that the defendant affirmatively
 12 created or contributed to the nuisance. *See, e.g., Perlmutter v. Lehigh Hanson, Inc.*, No. 21-2571,
 13 2021 WL 4033029, at *3 (N.D. Cal. Sept. 3, 2021) (“Ordinarily, a defendant may be liable for a
 14 nuisance even if it was not negligent in causing the invasion to the plaintiff’s property interest.”);
 15 *City of Pasadena v. Sup. Ct.*, 228 Cal. App. 4th 1228, 1236 (2014) (“Nuisance liability is not
 16 necessary based on negligence, thus, one may be liable for a nuisance even in the absence of
 17 negligence.”) (internal quotation marks omitted); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th
 18 1540, 1552 (2009) (explaining that a “a finding that [the defendant] has a duty of care” is
 19 “require[d]” only if the nuisance claim is “construed to allege *only* a failure to act”) (emphasis
 20 added).

21 The exception is where liability is premised on a pure inaction theory, for example where a
 22 property owner fails to prevent a tree from falling. *See City of Pasadena*, 228 Cal. App. 4th at 1236.
 23 Where, as here, nuisance liability is premised on action, not pure inaction, there is no duty element.
 24 *See Perlmutter*, 2021 WL 4033029, at *4 (“This case is readily distinguishable from *City of*
 25 *Pasadena* because, unlike a city that fails to prevent its tree from causing harm, Defendant’s
 26 nuisance liability here is not solely based on its failure to abate a nuisance. Rather, Plaintiffs allege
 27 that Defendant both created the nuisance and failed to abate it. ... Because Defendant’s nuisance
 28 liability is not solely based on its failure to prevent harm, California law does not require Plaintiffs

1 to prove that Defendant was negligent.).

2 Even if duty of care were an element of Plaintiff's nuisance claims, it would not be
3 appropriate to put that issue to the jury. Duty "is a legal issue and must be determined by the court."
4 *Mega RV Corp. v. HWH Corp.*, 225 Cal. App. 4th 1318, 1339 (2014) (citation omitted). As a general
5 matter, duty does not turn "on case-specific facts" but instead reflects a judicial determination on
6 "the category of negligent conduct at issue." *Cabral v. Ralphs Grocery Store Co.*, 51 Cal. 4th 764,
7 773 (2011); *see also id.* at 774 ("To base a duty ruling on the detailed facts of a case risks usurping
8 the jury's proper function of deciding what reasonable prudence dictates under those particular
9 circumstances."). For this reason, the California pattern jury instruction do not include duty
10 instructions.

11 Altria's relies on this Court's statement in *B.B.*, rejecting Altria's motion for summary
12 judgment on the duty element of B.B.'s negligence claims, that Altria's actions were "matters for
13 the jury to evaluate." *In re JUUL*, No. 19-2913, 2022 WL 1601418, at *14 (N.D. Cal. Apr. 29,
14 2022). All that this meant was that the jury could decide, in evaluating breach and causation,
15 whether Altria's knowledge and actions foreseeably and actually harmed B.B., not that duty was a
16 jury question. In addition, the Court noted, that, while "duty is a matter of law to be determined by
17 the Court, as the summary judgment stage the trial court must view the evidence of foreseeability,
18 risk and burden in the light most favorable to the non-moving party." *Id.* (citation omitted). Altria
19 is free to revisit its duty arguments on the full record.

20 *Third*, Altria contends that Plaintiff's proposed instructions "fail to define the alleged
21 nuisance." But despite these stated concerns, the difference between Altria's definition of the
22 alleged nuisance in the above instruction, "a youth e-cigarette public health crisis in SFUSD's
23 schools," and Plaintiff's definition of the nuisance, "youth e-cigarette use . . . within SFUSD's
24 schools" are minimal. Altria's instruction repeats the reference to public health in the preamble and
25 then again in the first number, whereas Plaintiff's instruction references public health once, in the
26 first number, along with the other enumerated interferences with public rights, consistent with the
27 pattern instruction and California law. *See* Cal. Civ. Code § 3479; *People ex rel. Gallo v. Acuna*,
28 929 P.2d 596, 604 (Cal. 1997) (explaining these are the "categories of public nuisance").

1 More generally, nothing requires the jury to find the nuisance with the sort of specificity
2 Altria suggests. Altria's concerns about the scope and nature of the nuisance are properly addressed
3 by the pattern instruction and Plaintiff's proposal. The contention that the jury is not being told
4 which "kinds of interference or types of harm that would support liability" is simply incorrect: the
5 jury is instructed that to find a nuisance, it must conclude that youth e-cigarette use within SFUSD's
6 schools is "harmful to health, is indecent or offensive to the senses, or is an obstruction to the free
7 use of property, so as to interfere with the comfortable enjoyment of life or property." Similarly,
8 the claim that the jury is not being instructed on "the amount of harm, or degree of interference
9 necessary to constitute a nuisance" again is belied by the instructions themselves. Plaintiff does not
10 have to prove a specific percentage of students are using e-cigarettes to show a nuisance. Instead,
11 Plaintiff's instruction properly requires the jury to find the required elements under California law:
12 that youth e-cigarette use within SFUSD's schools "affects a substantial number of people at the
13 same time," "the seriousness of the harm outweighs the social utility of Altria's conduct," and "an
14 ordinary person would be reasonably annoyed or disturbed by the condition." Altria seeks to impose
15 requirements on the jury that are not required by law and would merely serve to confuse and
16 unnecessarily complicate the issues the jury must decide.

17 Altria appears to contend that a bifurcated proceeding is somehow not appropriate here
18 under the Seventh Amendment (and therefore is presumably arguing that the Court must decide
19 both liability and abatement as the jury cannot do both) but ignores that there is not issue to be
20 retried in the abatement phase. If the jury finds that Plaintiff proved a nuisance exists, in the
21 abatement phase, the parties will present evidence of an appropriate abatement plan to address the
22 nuisance presented at trial. This poses no Seventh Amendment concerns. The Court will "follow
23 the jury's implicit or explicit factual determinations," and in the event "the basis for the jury's
24 verdict is open to multiple interpretations, the Seventh Amendment permits the district court to
25 reach any interpretation that is supported by the evidence." *Teutscher v. Woodson*, 835 F.3d 936,
26 944, 952 (9th Cir. 2016). If the jury's verdict could be interpreted in multiple ways, the Court is to
27 "select the one that it f[inds] to be best supported by the evidence and to determine equitable relief
28 in accord with that theory." *Id.* at 953.

Notably, Altria’s contention is irreconcilable with the opiate trial recently conducted by Judge Polster in N.D. Ohio. There, the jury found that “oversupply of legal prescription opioids, and diversion of those opioids into the illicit market outside of appropriate market channels, is a public nuisance in” two counties. *In re: Nat’l Prescription Opiate Litig. (County of Lake)*, MDL 2804, Doc. 4176 (N.D. Ohio Nov. 23, 2021). The jury was not asked whether the nuisance existed in all parts of the county or only certain parts; whether it was merely the “disposal” of drug paraphernalia in “improper places” or something more; whether the nuisance was based on “a certain number of” opioid-related “incidents”; or whether the nuisance depended on a “certain percentage” of persons abusing opioids. Nevertheless, the verdict was sufficient for the judge to then create an abatement plan to remedy the “nuisance the jury found” in light of the verdict, the jury instructions, and the evidence presented to the jury. *In re: Nat’l Prescription Opiate Litig. (County of Lake)*, MDL 2804, 2022 WL 3443614, at *12-13 (N.D. Ohio Aug. 17, 2022).

Nor is Altria correct that the instructions must “offer[a] way to determine what conduct by Altria, if any, the jury relied upon should it find that Altria is liable for contributing to a nuisance.” A nuisance is a condition, not merely any conduct that contributes to that condition. *See id* at *11 (nothing “the Restatement is clear that the nuisance is *the harm caused* by human activity or physical condition”) (citation omitted). Plaintiff’s proposed instruction makes is clear the jury must find a “condition,” not just bad conduct. *See id.* (“[W] hen a factfinder determines that the tortious conduct of a defendant creates a condition (or, in the case of multiple tortfeasors, is a substantial factor in creating a condition) that unreasonably interferes with a public right, that defendant is and remains liable for public nuisance, even if it has since ceased the conduct that created the harmful condition.”).

ALTRIA’S POSITION:

Plaintiff’s proposed instruction includes the additional language of “was indecent or offensive to the senses” which was not pled in Plaintiff’s complaint and accordingly should not be the basis of an instruction given to the jury. Plaintiff’s proposed instruction also improperly offers an alternative to the requisite element of injury to property by allowing the jury to substitute injury to property with a finding that “personal enjoyment was lessened by the nuisance.” Cal. Civ. Proc.

1 Code § 731 requires that Plaintiff prove an injury to property and thus this element must be included
2 in the jury instructions.

3 Altria’s proposed instruction is closely modeled on the pattern but includes language that
4 instructs the jury on governing California law that is not included in the current pattern instruction.
5 For instance, Altria’s proposed instruction includes language that clarifies that “not every
6 interference with collective social interests constitutes a public nuisance. To qualify . . . the
7 interference must be both substantial and unreasonable.” *People ex rel. Gallo v. Acuna*, 14 Cal. 4th
8 1090, 1105, 60 Cal. Rptr. 2d 277, 929 P.2d 596 (1997). Altria’s proposed instruction also includes
9 a knowledge element. This is an accurate statement of California public nuisance law that is not
10 adequately captured by the pattern instruction alone. *People v. ConAgra Grocery Products Co.*, 17
11 Cal. App. 5th 51, 79, 227 Cal. Rptr. 3d 499 (2017) (“A public nuisance cause of action is established
12 by proof that a defendant knowingly created or assisted in the creation of a substantial and
13 unreasonable interference with a public right.”). To exclude this element would be incomplete and
14 mislead the jury. Altria’s proposed instruction also includes a duty element. This element of public
15 nuisance is not adequately explained by the pattern instruction alone. Although the question of
16 duty is often a legal one, this Court has previously concluded in this litigation that the question of
17 duty raises “matters for the jury to evaluate.” Order on Defs. Motions for Summary Judgment
18 Regarding B.B., ECF 3083 (Apr. 29, 2022).

19 Altria further objects because the Plaintiff’s proposal here and instructions more generally
20 fail to define the alleged nuisance or provide any guidance to the jury concerning the scope or
21 impact of underage vapor use at SFUSD schools to constitute a nuisance or any other information
22 defining the alleged nuisance. Plaintiff simply treats nuisance liability as a binary choice—*e.g.*,
23 was there a nuisance, yes or no. The lack of instruction to the jury on this issue is problematic in
24 its own right. But it is especially improper and objectionable in this case because Altria’s liability
25 for nuisance and the scope of any abatement remedy are set to be decided in bifurcated proceedings.
26 If the jury answers yes to liability, then SFUSD would present separate evidence in an abatement
27 phase. But there is no guarantee, given Plaintiff’s approach, that the nuisance the jury finds would
28 be the same nuisance that Plaintiff then asks the Court to abate.

1 For example, Plaintiff's proposed instruction, and the Plaintiff's approach more generally,
2 is completely silent on whether the nuisance includes all schools, some schools, a certain number
3 of schools, or one school. As written, the instruction appears to allow the jury to find a nuisance
4 based on the underage vaping at a single school or instead to conclude that there must be vaping at
5 numerous schools. The jury's conclusion on this issue would be directly relevant to scope of any
6 abatement remedy. If the jury does not find a nuisance at every school, abatement should not be
7 ordered for every school. To the contrary, any abatement remedy must be tailored to remediating
8 a specific nuisance.

9 The jury instructions also do not provide any guidance to the jury on the kinds of
10 interference or types of harm that would support liability or the prevalence of vaping, or the amount
11 of harm, or degree of interference necessary to constitute a nuisance. As a result, there would be
12 no way to determine what it was that the jury found to be an unreasonable condition at SFUSD
13 schools that substantially interferes with use and enjoyment. A jury might conclude that disposal
14 of JUUL products in improper locations is a nuisance, or it might conclude that use of JUUL
15 products by students in the parking lot before school is a nuisance, or it might conclude that having
16 to lock certain hallways is a nuisance, and so on. The abatement remedy, however, should be
17 targeted to the nuisance that gave rise to liability. And the relief necessary to remediate one form
18 of nuisance would have no impact on another form of nuisance, as these examples illustrate. In
19 addition, the instructions do not provide any instruction to the jury on the amount of vaping at
20 school or the prevalence of any other conduct that it needs to find to conclude that there is a
21 nuisance. This too is problematic. If the jury bases its decision on whether there were certain
22 number of incidents at a school or a certain percentage of students vaping at school sufficiently
23 shows a nuisance, the abatement remedy would need to be focused on that finding.

24 Moreover, Plaintiff's approach offers no way to determine what conduct by Altria, if any,
25 the jury relied upon should it find that Altria is liable for contributing to a nuisance. Again, there
26 would be no way to craft an abatement remedy focused on that conduct. And these are just
27 examples. The larger point is that, if information reflecting what the jury found was a nuisance is
28 not available during Phase 3, it would leave the Court either to guess at the jury's finding or instead

1 to re-examine the same evidence and issues the jury would have decided. Either approach would
2 be improper.

3 Indeed, bifurcated proceedings are appropriate only where “the issue to be retried is so
4 distinct and separable from the others that a trial of it alone may be had without injustice.” *Gasoline*
5 *Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). That means the phases of the trial
6 cannot involve re-litigating the scope of the nuisance. If the Phase 1 liability proceedings do not
7 make clear what nuisance, if any, Altria is liable for creating or contributing to, the verdict will not
8 “establish[] . . . material facts,” *id.*, and there will be intertwined issues that would be inevitably re-
9 litigated in any Phase 3. This result would violate the Seventh Amendment, which “provides that
10 ‘no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than
11 according to the rules of the common law.’” *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828–29
12 (9th Cir. 2013) (quoting U.S. Const. amend. VII).

13 “[I]n a case where legal claims are tried by a jury and equitable claims are tried by a judge,
14 and the claims are based on the same facts, in deciding the equitable claims the Seventh Amendment
15 requires the trial judge to follow the jury’s implicit or explicit factual determinations.” *Id.*
16 (quotations omitted); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1449, 1473 (9th Cir.
17 1993) (same). “[I]t would be a violation of the seventh amendment right to jury trial for the court to
18 disregard a jury’s finding of fact.” *Los Angeles Police Protective League*, 995 F.2d at 1473; *see also*
19 *Kaneka Corp. v. SKC Kolon PI, Inc.*, 198 F. Supp. 3d 1089, 1115 (C.D. Cal. 2016) (“[W]here there is
20 substantial commonality between the factual questions presented by legal and equitable claims, a jury’s
21 finding of fact pertinent to the legal claim constrains the court’s equitable determination.” (quotations
22 omitted)). Importantly, the Seventh Amendment requires that even implied findings must be followed:
23 “rather than being limited to the face of the verdict, the jury’s findings include any factual findings that
24 the verdict’s contents necessarily imply.” *In re EPD Inv. Co., LLC*, 2020 WL 6937351, at *3 (Bankr.
25 C.D. Cal. Oct. 29, 2020).

1 **[Contested, Altria-Proposed] Public Nuisance – Interference with Public Right**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s public nuisance claim requires proof that the alleged knowing, substantial, and
 4 unreasonable interference has impacted and/or is impacting a public right. A public right is a
 5 collective right that is common to all members of the general public, as opposed to private rights,
 6 which are enjoyed by people in their individual capacities. It is a right that belongs to the
 7 community at large.

8 If you find that Altria’s alleged wrongful conduct did not interfere with a public right, then
 9 you must find Altria not liable for public nuisance. If you find that Altria engaged in wrongful
 10 conduct and that Altria’s wrongful conduct interfered with a public right, then you must next
 11 determine whether Altria knowingly, substantially, and unreasonably interfered with that public
 12 right in a manner that caused or will cause damage or injury.

13 **ALTRIA’S POSITION:**

14 Altria’s instruction is an accurate statement of the law regarding public nuisances. A public
 15 nuisance is defined as an “unreasonable interference with a right common to the general public.”
 16 Restatement (Second) of Torts § 821(b)(1) (1979). Whether the interference is unreasonable turns
 17 on weighing “the gravity of the harm against the utility of the conduct.” *Id.* § 821 cmt. e.” *People*
 18 *ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1105, 60 Cal. Rptr. 2d 277, 929 P.2d 596 (1997) (citing
 19 Restatement (Second) of Torts, §§ 826–831) (“The unreasonableness of a given interference
 20 represents a judgment reached by comparing the social utility of an activity against the gravity of
 21 the harm it inflicts, taking into account a handful of relevant factors.”); *People v. ConAgra Grocery*
 22 *Prod. Co.*, 17 Cal. App. 5th 51, 79, 227 Cal. Rptr. 3d 499, 525 (2017) (concluding that lead paint
 23 exposure in private homes implicated a public right because residential housing is an essential
 24 shared community resource like streets, water, electricity, natural gas, or sewer services); *City of*
 25 *W. Sacramento v. R & L Bus. Mgmt.*, 2020 WL 6342930, at *2 (E.D. Cal. Oct. 29, 2020) (“A
 26 plaintiff must show ‘substantial and unreasonable interference, either with a public right or with
 27 the enjoyment of a plaintiff’s property.’”) (citation omitted); *Helix Land Co., Inc. v. City of San*
 28 *Diego*, 82 Cal. App. 3d 932, 950, 147 Cal. Rptr. 683 (1978) (“An essential element of a cause of

1 action for nuisance is damage or injury.”).

2 **PLAINTIFF’S POSITION:**

3 Altria does not explain why the California pattern instruction is insufficient. *See Dep’t of*
 4 *Fish & Game v. Sup. Ct.*, 197 Cal. App. 4th 1323, 1352 (2011) (relying on the pattern instruction);
 5 *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1548 (2009) (same).

6 Altria’s proposed instruction add confusion because it tells the jury it might find that Altria’s
 7 conduct “interfered with a public right.” In reality, California has already determined that
 8 interference with “public health” *is* interference with a public right. Under California law “anything
 9 that is’ injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use
 10 of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully
 11 obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay,
 12 stream, canal, or basin, or any public park, square, street, or highway” is a nuisance. *People ex rel.*
 13 *Gallo v. Acuna*, 14 Cal. 4th 1090, 1104 (1997) (quoting Cal. Civ. Code § 3479) (internal quotation
 14 marks and alteration omitted). A *public* nuisance *is* one that “affects at the same time an entire
 15 community or neighborhood, or any considerable number of persons.” *Id.* (quoting Cal. Civ. Code
 16 § 3480). The pattern instruction includes both of these elements. The jury is not required to find a
 17 statutorily-defined public nuisance *and* find separately that Altria’s conduct interfered with a
 18 “public right.”

19 Finally, Altria’s additions of substantial and unreasonable to the instruction merely repeat
 20 what the jury is already required to find under the pattern instruction. The conduct is “unreasonable
 21 if its social utility is outweighed by the gravity of the harm inflicted,” *People v. ConAgra Grocery*
 22 *Products Co.*, 17 Cal. App. 5th 51, 112 (Cal. App. 6th Dist. 2017), and the jury is already required
 23 by the pattern elements instruction to find “[t]hat the seriousness of the harm outweighs the social
 24 utility of the Defendant’s conduct.” Similarly, the interference is substantial if it causes significant
 25 harm, meaning that, objectively, it is a “real and appreciable invasion of the plaintiff’s interests,”
 26 one that is “definitely offensive, seriously annoying or intolerable.” *People ex rel. Gallo v. Acuna*,
 27 929 P.2d 596, 605 (Cal. 1997) (quoting Restatement (Second) of Torts § 821F) (“By significant
 28 harm is meant harm of importance, involving more than slight inconvenience or petty annoyance.”).

1 The jury is already required by the pattern elements instruction to find that “[t]hat an ordinary
2 person would be reasonably annoyed or disturbed by the condition.” Finally, the jury has already
3 been instructed that it must find “[t]hat Altria’s conduct was a substantial factor in causing
4 SFUSD’s harm.”

1 **[Contested, Altria-Proposed] Public Nuisance – Plaintiff’s Alleged Nuisance**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s public nuisance claim requires proof that the use of JUUL products, and not vapor
4 products generally, by students on SFUSD school grounds imposes a substantial and unreasonable
5 interference that is impacting a public right.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction is consistent with the causation requirement that Plaintiff must
8 meet to establish its public nuisance claim. *See, e.g., City & Cnty. of San Francisco v. Purdue*
9 *Pharma L.P.*, 491 F. Supp. 3d 610, 676 (N.D. Cal. 2020) (“A plaintiff must prove factual causation,
10 which requires proving that a defendant’s conduct was a substantial factor in bringing about the
11 nuisance. Additionally, a plaintiff must establish that the defendant’s wrongful conduct was not
12 too remote from the current hazard to be its legal cause, i.e., proximate causation.”) (internal cites
13 omitted); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (RICO requires proximate
14 causation). It is also consistent with the requirement that Altria create or contribute to the alleged
15 nuisance. *See, e.g., CACI 2020; Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643
16 F.3d 668, 674 (9th Cir. 2011) (“Under California law, conduct cannot be said to ‘create’ a nuisance
17 unless it more actively or knowingly generates or permits the specific nuisance condition.”); *People*
18 *v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 79, 227 Cal. Rptr. 3d 499 (2017) (“A public
19 nuisance cause of action is established by proof that a defendant knowingly created or assisted in
20 the creation of a substantial and unreasonable interference with a public right.”); *Cnty. of Santa*
21 *Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 309, 40 Cal. Rptr. 3d 313, 328 (2006) (“Liability
22 is not based merely on production of a product or failure to warn.”). To the extent that Plaintiff
23 seeks to impose liability based on injuries or harm that was caused by other vapor products, any
24 connection between the Plaintiff’s alleged harm and Altria’s conduct would be too remote and
25 indirect to establish proximate causation. *See, e.g., Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9
26 (2010) (Proximate causation requires “some direct relation between the injury asserted and the
27 injurious conduct alleged” and cannot be “too remote, purely contingent, or indirect”) (citations
28 and quotations omitted). Moreover, vapor products were available and being used before JUUL

1 products were introduced. Plaintiff's argument that it plans to offer evidence and ask the jury to
2 impose liability based on "'copycat' products such as 'Puff Bar'" only confirms that this instruction
3 is necessary to ensure that the jury does not base liability for nuisance on underage vaping that
4 Altria did not cause, create, or contribute to.

5 **PLAINTIFF'S POSITION:**

6 This proposed instruction misstates the facts. Plaintiff's proof will show that the JUUL-
7 caused and Altria-abetted youth vaping epidemic in later stages manifested through "copycat"
8 products such as "Puff Bar." *E.g.*, Cutler 9/0/21 Rpt. at 51-54. Whether that causal connection has
9 been proven is a matter for the jury.

[Contested, Altria-Proposed] Public Nuisance – Creation

ALTRIA’S PROPOSAL:

To hold Altria liable for public nuisance, Plaintiff’s public nuisance claim requires proof that Altria knowingly created or contributed to a substantial and unreasonable interference with a public right in a manner that caused damage or injury.

ALTRIA’S POSITION:

Altria’s proposed instruction is an accurate statement of the law. CACI 2020; *Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 674 (9th Cir. 2011) (“Under California law, conduct cannot be said to ‘create’ a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition.”); *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 79, 227 Cal. Rptr. 3d 499 (2017) (“A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right.”); *Cnty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 309, 40 Cal. Rptr. 3d 313, 328 (2006) (“Liability is not based merely on production of a product or failure to warn.”). This instruction is also necessary and appropriate here given the different entities involved in the design, manufacture, distribution, marketing, and sale of JUUL and those entities’ different alleged conduct. The instruction is needed to make clear that JUUL-related conduct by Altria is not sufficient. Instead, Altria must have created or contributed to the substantial and unreasonable interference that comprises the public nuisance.

PLAINTIFF’S POSITION:

Altria does not explain why the California pattern instruction is insufficient. *See Dep’t of Fish & Game v. Sup. Ct.*, 197 Cal. App. 4th 1323, 1352 (2011) (relying on the pattern instruction); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1548 (2009) (same). In an abundance of caution, Plaintiff has already added a knowledge element to the pattern element instruction *City and County of San Francisco v. Purdue Pharma L.P.*, 18-CV-07591-CRB, 2022 WL 3224463, at *53 (N.D. Cal. Aug. 10, 2022) (“The Court does not decide whether California law incorporates an actual knowledge requirement because the facts proved at trial satisfy the actual knowledge

1 requirement.”).

2 In the pattern instruction, the jury has already been instructed that to find liability, it must
3 find that “[t]hat Altria, by acting or failing to act, created a condition or permitted a condition to
4 exist that was harmful to health, was indecent or offensive to the senses, or was an obstruction to
5 the free use of property, so as to interfere with the comfortable enjoyment of life or property, “[t]hat
6 Altria had knowledge that its unreasonable conduct would create a condition harmful to health, was
7 indecent or offensive to the senses, or was an obstruction to the free use of property, so as to
8 interfere with the comfortable enjoyment of life or property, “[t]hat the condition affected a
9 substantial number of people at the same time,” and “[t]hat an ordinary person would be reasonably
10 annoyed or disturbed by the condition.”

11 Altria’s additions merely repeat what the jury is already required to find under the pattern
12 instruction. The conduct is “unreasonable if its social utility is outweighed by the gravity of the
13 harm inflicted,” *People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51, 112 (Cal. App. 6th
14 Dist. 2017), and the jury is already required by the pattern elements instruction to find “[t]hat the
15 seriousness of the harm outweighs the social utility of the Defendant’s conduct.” Similarly, the
16 interference is substantial if it causes significant harm, meaning that, objectively, it is a “real and
17 appreciable invasion of the plaintiff’s interests,” one that is “definitely offensive, seriously
18 annoying or intolerable.” *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 605 (Cal. 1997) (quoting
19 Restatement (Second) of Torts § 821F) (“By significant harm is meant harm of importance,
20 involving more than slight inconvenience or petty annoyance.”). The jury is already required by
21 the pattern elements instruction to find that “[t]hat an ordinary person would be reasonably annoyed
22 or disturbed by the condition.”

1 **[Contested, Altria-Proposed] Public Nuisance – Whether Altria Created or Contributed**
 2 **ALTRIA’S PROPOSAL:**

3 When deciding whether Altria created or contributed to a nuisance consisting of student
 4 JUUL use on SFUSD school grounds, you should evaluate the prevalence and impact of underage
 5 JUUL use on school grounds before Altria took any action involving JUUL products and the
 6 prevalence and impact of underage JUUL use on SFUSD school ground as of today.

7 **ALTRIA’S POSITION:**

8 Altria’s proposed instruction is consistent with the causation requirement that Plaintiff must
 9 meet to establish its public nuisance claim. *See, e.g., City & Cnty. of San Francisco v. Purdue*
 10 *Pharma L.P.*, 491 F. Supp. 3d 610, 676 (N.D. Cal. 2020) (“A plaintiff must prove factual causation,
 11 which requires proving that a defendant’s conduct was a substantial factor in bringing about the
 12 nuisance. Additionally, a plaintiff must establish that the defendant’s wrongful conduct was not
 13 too remote from the current hazard to be its legal cause, i.e., proximate causation.”) (internal cites
 14 omitted); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (RICO requires proximate
 15 causation). It is also consistent with the requirement that Altria create or contribute to the alleged
 16 nuisance. *See, e.g., CACI 2020; Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643
 17 F.3d 668, 674 (9th Cir. 2011) (“Under California law, conduct cannot be said to ‘create’ a nuisance
 18 unless it more actively or knowingly generates or permits the specific nuisance condition.”); *People*
 19 *v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 79, 227 Cal. Rptr. 3d 499 (2017) (“A public
 20 nuisance cause of action is established by proof that a defendant knowingly created or assisted in
 21 the creation of a substantial and unreasonable interference with a public right.”); *Cnty. of Santa*
 22 *Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 309, 40 Cal. Rptr. 3d 313, 328 (2006) (“Liability
 23 is not based merely on production of a product or failure to warn.”).

24 To the extent that Plaintiff seeks to impose liability based on injuries or harm that was
 25 caused by conduct that occurred before Altria took any JUUL-related actions, Plaintiff cannot
 26 establish proximate causation. *See, e.g., Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010)
 27 (Proximate causation requires “some direct relation between the injury asserted and the injurious
 28 conduct alleged” and cannot be “too remote, purely contingent, or indirect”) (citations and

1 quotations omitted). Vapor products were available and being used before JUUL products were
2 introduced, and JUUL products were sold for years before Altria engaged in any conduct that could
3 have created or contributed to the alleged nuisance. Moreover, Plaintiff alleges that underage
4 vaping was widespread before Altria is alleged to have engaged in any JUUL-related conduct.
5 Given this timeline, and Plaintiff's intentions to offer evidence predating Altria's involvement, the
6 jury should consider the extent to which the alleged nuisance existed before Altria's involvement
7 began when determining whether Altria created or contributed to that nuisance as necessary to
8 establish Altria's liability. This is not a factual argument; it is a proper instruction that is warranted
9 here.

10 **PLAINTIFF'S POSITION:**

11 This is Altria's factual argument, not a jury instruction. Under Plaintiff's proposed nuisance
12 instruction, the jury is adequately instructed that it must find Altria contributed to a public nuisance
13 and that Altria's conduct was a substantial factor in causing SFUSD's harm. There are all kinds of
14 factual issues that go into that determination, e.g., Altria's motive, knowledge, retail strength, etc.
15 There is no reason to instruct the jury on one of those factual issues to the exclusion of others.

16 In addition, the proposed instruction is factually inaccurate. Plaintiff's theory of the case is
17 that the harm caused by Altria's conduct includes underage use of "copycat" products, not just
18 JUUL.

[Contested, Altria-Proposed] Duty of Care Required

ALTRIA’S PROPOSAL:

Altria can only be liable for nuisance if it owed a duty of care toward the Plaintiff. In order to find that Altria assumed a duty of care toward Plaintiff, you must find that Altria’s conduct put Plaintiff directly at risk of suffering injury and that Plaintiff’s harm was closely tied to Altria’s actions. If you conclude that Altria did not assume a duty of care toward Plaintiff, Altria would not be liable for nuisance.

ALTRIA’S POSITION:

Altria’s proposed instruction is an accurate statement of California nuisance law that is not adequately explained by the pattern instruction alone. Although the question of duty is often a legal one, this Court has previously concluded in this litigation that the question of duty raises “matters for the jury to evaluate.” Order on Defs. Motions for Summary Judgment Regarding B.B., ECF 3083 (Apr. 29, 2022).

PLAINTIFF’S POSITION:

This proposed instruction has two fatal flaws. First, a duty of care is not an element of a public nuisance claim, at least not one premised on allegations that the defendant affirmatively created or contributed to the nuisance. *See, e.g., Perlmutter v. Lehigh Hanson, Inc.*, No. 21-2571, 2021 WL 4033029, at *3 (N.D. Cal. Sept. 3, 2021) (“Ordinarily, a defendant may be liable for a nuisance even if it was not negligent in causing the invasion to the plaintiff’s property interest.”); *City of Pasadena v. Sup. Ct.*, 228 Cal. App. 4th 1228, 1236 (2014) (“Nuisance liability is not necessary based on negligence, thus, one may be liable for a nuisance even in the absence of negligence.”) (internal quotation marks omitted); *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1552 (2009) (explaining that a “a finding that [the defendant] has a duty of care” is “require[d]” only if the nuisance claim is “construed to allege *only* a failure to act”) (emphasis added). The exception is where liability is premised on a pure inaction theory, for example where a property owner fails to prevent a tree from falling. *See City of Pasadena*, 228 Cal. App. 4th at 1236. Where, as here, nuisance liability is premised on action, not pure inaction, there is no duty element. *See Perlmutter*, 2021 WL 4033029, at *4 (“This case is readily distinguishable from *City*

1 of Pasadena because, unlike a city that fails to prevent its tree from causing harm, Defendant's
 2 nuisance liability here is not solely based on its failure to abate a nuisance. Rather, Plaintiffs allege
 3 that Defendant both created the nuisance and failed to abate it. ... Because Defendant's nuisance
 4 liability is not solely based on its failure to prevent harm, California law does not require Plaintiffs
 5 to prove that Defendant was negligent.).

6 Second, even if duty of care were an element of Plaintiff's nuisance claims, it would not be
 7 appropriate to put that issue to the jury. Duty "is a legal issue and must be determined by the court."
 8 *Mega RV Corp. v. HWH Corp.*, 225 Cal. App. 4th 1318, 1339 (2014) (citation omitted). As a general
 9 matter, duty does not turn "on case-specific facts" but instead reflects a judicial determination on
 10 "the category of negligent conduct at issue." *Cabral v. Ralphs Grocery Store Co.*, 51 Cal. 4th 764,
 11 773 (2011); *see also id.* at 774 ("To base a duty ruling on the detailed facts of a case risks usurping
 12 the jury's proper function of deciding what reasonable prudence dictates under those particular
 13 circumstances."). For this reason, the California pattern jury instruction do not include duty
 14 instructions.

15 California arguably recognizes an exception to this rule where duty is a function of specific
 16 fact questions. *See O'Malley v. Hospitality Staffing Sols.*, 20 Cal. App. 5th 21, 27 (2018) ("[U]nder
 17 a negligent undertaking theory of liability, the scope of a defendant's duty presents a jury issue
 18 when there is a factual dispute as to the nature of the undertaking."). Here, the duty analysis rests
 19 on standard considerations of foreseeability and public policy that are legal questions for the Court
 20 to consider. *See Kaney v. Custance*, 74 Cal. App. 5th 201, 215 (2022) ("Foreseeability is a question
 21 of law."); *Carter v. Nat'l R.R. Passenger Corp.*, 63 F. Supp. 3d 1118, 1146 (N.D. Cal. 2014) ("[A]
 22 court's task—in determining "duty"—is not to decide whether a particular plaintiff's injury was
 23 reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more
 24 generally whether the category of negligent conduct at issue is sufficiently likely to result in the
 25 kind of harm experienced that liability may appropriately be imposed on the negligent party. The
 26 jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the
 27 jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the
 28 particular defendant's conduct was negligent in the first place. Second, foreseeability may be

1 relevant to the jury's determination of whether the defendant's negligence was a proximate or legal
2 cause of the plaintiff's injury.") (quoting *Ballard v. Uribe*, 41 Cal. 3d 564, 572 n.6 (1986)).

3 Altria relies on this Court's statement in *B.B.*, rejecting Altria's motion for summary
4 judgment on the duty element, that Altria's actions were "matters for the jury to evaluate." *In re*
5 *JUUL*, No. 19-2913, 2022 WL 1601418, at *14 (N.D. Cal. Apr. 29, 2022). All that this meant was
6 that the jury could decide, in evaluating breach and causation, whether Altria's knowledge and
7 actions foreseeably and actually harmed B.B., not that duty was a jury question. In addition, the
8 Court noted that while "duty is a matter of law to be determined by the Court, as the summary
9 judgment stage the trial court must view the evidence of foreseeability, risk and burden in the light
10 most favorable to the non-moving party." *Id.* (citation omitted). Altria is free to revisit its duty
11 arguments on the full record.

1 **[Contested, Altria-Proposed] Public Nuisance -- Causation**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s nuisance claim requires proof of two types of causation: cause-in-fact and legal
4 cause.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is an accurate statement of California law regarding public
7 nuisance causation that is not sufficiently explained by the pattern instruction alone. *City & Cnty.*
8 *of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 676 (N.D. Cal. 2020) (“A plaintiff
9 must prove factual causation, which requires proving that a defendant’s conduct was a substantial
10 factor in bringing about the nuisance. Additionally, a plaintiff must establish that the defendant’s
11 wrongful conduct was not too remote from the current hazard to be its legal cause, i.e., proximate
12 causation.”) (internal cites omitted). Plaintiff reads *Mitchell v. Gonzalez*, 54 Cal. 3d 1041 (1991),
13 too broadly. *Mitchell* held only that the specific proximate cause instruction in BAJI No. 3.75 was
14 error because the specific language in that instruction was “conceptually and grammatically
15 deficient.” *Id.* at 1052-54.

16 **PLAINTIFF’S POSITION:**

17 Below, the parties have agreed on CACI 430, the pattern substantial factor instruction. This
18 instruction, and the following few instructions, reflect a dispute over whether the jury must also be
19 instructed on proximate cause.

20 California does not instruct juries separately on cause-in-fact and proximate cause. This
21 makes sense: proximate cause includes public policy factors that are not susceptible to jury
22 determination. *E.g.*, *City & Cnty. of San Francisco v. Purdue Pharma, L.P.*, 491 F. Supp. 3d 610,
23 679 (N.D. Cal. 2020) (“Proximate cause is ordinarily concerned, not with the fact of causation, but
24 with the various considerations of policy that limit an actor’s responsibility for the consequences
25 of his conduct.”) (internal quotation marks omitted).

26 The California Supreme Court has held that giving a proximate cause instruction is legal
27 error, and that instead courts should instruct on “the ‘substantial factor’ test.” *Mitchell v. Gonzalez*,
28 54 Cal. 3d 1041, 1052-53 (1991). In addition, the Court explained, this test “subsumes the ‘but for’

1 test.” *Id.* It also helps the jury resolve (1) “the problem of independent causes,” (2) “where a similar,
2 but not identical result would have followed without the defendant’s act,” and (3) “where one
3 defendant has made a clearly proved but quite insignificant contribution to the result.” *Id.* For this
4 reason, the operative California pattern instructions collapse causation to a single substantial factor
5 instruction. CACI 430.

6 Altria argues that Plaintiff misstates the holding of *Mitchell*, but the court there specifically
7 rejected a proximate cause instruction in favor of a substantial factor instruction: “Use of BAJI No.
8 3.76 [substantial factor] will avoid much of the confusion inherent in BAJI No. 3.75 [proximate
9 cause]. It is intelligible and easily applied. We therefore conclude that BAJI No. 3.75, the so-called
10 proximate cause instruction, should be disapproved and that the court erred when it refused to give
11 BAJI No. 3.76 and instead gave BAJI No. 3.75.” *Id.* at 1054. If Altria were correct on this point,
12 then why would the pattern instructions provide only for a substantial factor instruction?

1 **[Contested, Altria-Proposed] Cause in Fact**

2 **ALTRIA’S PROPOSAL:**

3 A defendant’s conduct is a cause-in-fact of the Plaintiff’s injury if, as a factual matter, it
4 was a substantial factor in causing Plaintiff’s alleged injury.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is an accurate statement of California law. *City & Cnty. of San*
7 *Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 676 (N.D. Cal. 2020) (“A plaintiff must
8 prove factual causation, which requires proving that a defendant’s conduct was a substantial factor
9 in bringing about the nuisance. Additionally, a plaintiff must establish that the defendant’s wrongful
10 conduct was not too remote from the current hazard to be its legal cause, i.e., proximate causation.”)
11 (internal cites omitted). Plaintiff reads *Mitchell v. Gonzalez*, 54 Cal. 3d 1041 (1991), too broadly.
12 *Mitchell* held only that the specific proximate cause instruction in BAJI No. 3.75 was error because
13 the specific language in that instruction was “conceptually and grammatically deficient.” *Id.* at
14 1052-54.

15 **PLAINTIFF’S POSITION:**

16 California does not instruct juries separately on cause-in-fact. Instead, the operative
17 California pattern instructions collapse causation to a single substantial factor instruction. CACI
18 430. The liability elements already tell the jury it must find substantial factor causation, so this
19 proposed instruction adds nothing. *See Mitchell v. Gonzalez*, 54 Cal. 3d 1041, 1052-53 (1991)
20 (substantial factor “subsumes the ‘but for’ test.”).

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Causation – Substantial Factor³⁶

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

³⁶ CACI 430

[Contested, Plaintiff-Proposed] Multiple Causes**PLAINTIFF’S PROPOSAL:**

A person’s negligence may combine with another factor to cause harm. If you find that Altria’s negligence was a substantial factor in causing SFUSD’s harm, then Altria is responsible for the harm. Altria cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing SFUSD’s harm.

PLAINTIFF’S POSITION:

The California pattern instructions require that this instruction (CACI 431) be given “[i]n cases of multiple (concurrent dependent) causes,” i.e., where multiple persons cause harm. CACI 430, *Directions for Use*; see also, e.g., *Uriell v. Regents of the Univ. of Cal.*, 234 Cal. App. 4th 735, 746-47 (2015) (“We are also not persuaded CACI No. 431 confused the jury or diluted the standard for causation. The [defendants] conflate the legal concepts of substantial factor for causation and concurrent cause. CACI No. 431 is necessary to explain to the jury a ‘plaintiff need not prove that the defendant’s negligence was the sole cause of plaintiff’s injury in order to recover. Rather it is sufficient that defendant’s negligence is a legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious.’”).

ALTRIA’S POSITION:

Altria objects to this instruction as duplicative of the other causation instructions. In particular, this instruction is duplicative and repetitive of the substantial factor instruction. There is no reason to instruct the jury on the substantial factor requirement twice. To the contrary, doing so would only be potentially confusing to the jury and prejudicial.

[Contested, Altria-Proposed] Legal Cause

ALTRIA’S PROPOSAL:

If you determine that Altria’s conduct is a cause-in-fact of the Plaintiff’s injury, you must decide whether Altria’s conduct was also a legal cause of the Plaintiff’s injury. A defendant’s conduct is a legal cause of the Plaintiff’s injury if the harm giving rise to the action could have been reasonably foreseen or anticipated by a person of ordinary intelligence and care.

ALTRIA’S POSITION:

Altria’s proposed instruction is an accurate statement of the law regarding causation in California nuisance cases. *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 676 (N.D. Cal. 2020) (“A plaintiff must prove factual causation, which requires proving that a defendant’s conduct was a substantial factor in bringing about the nuisance. Additionally, a plaintiff must establish that the defendant’s wrongful conduct was not too remote from the current hazard to be its legal cause, i.e., proximate causation.”) (internal cites omitted); *Schonbrun v. SNAP, Inc.*, 2022 WL 2903118, at *9 (C.D. Cal. Mar. 15, 2022), *reconsideration denied*, 2022 WL 2903128 (C.D. Cal. May 10, 2022) (“A long-standing principle of California nuisance law is that liability only extends to damage which is proximately or legally caused by the defendant’s conduct, not to damage suffered as a proximate result of the independent intervening acts of others.”) (internal cite omitted); *see Lautemann v. Bird Rides, Inc.*, 2019 WL 3037934, at *7 (C.D. Cal. May 31, 2019) (“Moreover, some class members may not be entitled to any relief, for example if . . . Defendant’s service was found not to be the legal cause of their injuries . . .”). Plaintiff reads the holding of *Mitchell v. Gonzalez*, 54 Cal. 3d 1041 (1991), too broadly. *Mitchell* held only that the specific proximate cause instruction in BAJI No. 3.75 was error because the specific language in that instruction was “conceptually and grammatically deficient.” *Id.* at 1052-54.

PLAINTIFF’S POSITION:

California does not instruct juries separately on cause-in-fact and proximate cause. The California Supreme Court has held that giving a proximate cause instruction is legal error, and that instead courts should instruct on “the ‘substantial factor’ test.” *Mitchell v. Gonzalez*, 54 Cal. 3d 1041, 1052-53 (1991). That test already tells the jury to rule out any “remote or trivial” causes.

1 Altria argues that Plaintiff misstates the holding of *Mitchell*, but the court there specifically
2 rejected a proximate cause instruction in favor of a substantial factor instruction: “Use of BAJI No.
3 3.76 [substantial factor] will avoid much of the confusion inherent in BAJI No. 3.75 [proximate
4 cause]. It is intelligible and easily applied. We therefore conclude that BAJI No. 3.75, the so-called
5 proximate cause instruction, should be disapproved and that the court erred when it refused to give
6 BAJI No. 3.76 and instead gave BAJI No. 3.75.” *Id.* at 1054. If Altria were correct on this point,
7 then why would the pattern instructions provide only for a substantial factor instruction?

1 **[Contested, Altria-Proposed] Public Nuisance – Altria’s Conduct Must Have Caused Harm**
 2 **ALTRIA’S PROPOSAL:**

3 A Defendant is liable in nuisance only for the harm that resulted from the Defendant’s
 4 conduct that created or contributed to creating the nuisance. Altria therefore would not be liable
 5 for injuries or damages caused by separate entities, including JLI and JLI’s officers and directors,
 6 by Plaintiff, or by other third parties, including other companies that manufacture or sell other
 7 brands of vapor products or other products more generally. Nor is Altria liable for injuries or
 8 damages caused by any alleged nuisance existing before actions by Altria that allegedly contributed
 9 to that nuisance.

10 **ALTRIA’S POSITION:**

11 Altria’s proposed instruction is an accurate statement of the law of public nuisance both in
 12 California and more broadly. *See, e.g.*, Statement of Decision at 49, 98-99, *People of California v.*
 13 *Atl. Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct. Jan. 7, 2014) (holding that lead paint
 14 defendant, ARCO, could not be liable for alleged public nuisance created by other defendants:
 15 “ARCO cannot be held liable for the alleged public nuisance because Plaintiffs presented no
 16 evidence that any conduct by ARCO caused any portion of the alleged public nuisance.”); *People*
 17 *v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 65, 227 Cal. Rptr. 3d 499, 514 (2017)
 18 (reversing abatement remedy for post-1950 homes after concluding that the “record lacks
 19 substantial evidence to support the court’s finding that their wrongful promotions were causally
 20 connected to post-1950 homes containing interior lead paint built before 1980); *In re Nat’l*
 21 *Prescription Opiate Litig.*, No. 18-OP-45032, 2022 WL 3443614, at *1 (N.D. Ohio Aug. 17, 2022)
 22 (declining “to hold Defendants jointly and severally liable for the entire amount of abatement
 23 costs”). This instruction is also necessary and appropriate here because many factors might have
 24 caused the alleged nuisance and the Plaintiff’s purported injuries. The Court should make clear to
 25 the jury that Altria is not liable for harms that Altria did not cause, including harms that were caused
 26 by conduct that came before Altria engaged in conduct that created or contributed to the nuisance.

27 **PLAINTIFF’S POSITION:**

28 This instruction is repetitive and unnecessary in light of the other causation instructions,

1 including the multiple causes instruction (to which Altria objected) and the nuisance elements
2 instruction. The jury is already required by the pattern elements instruction to find “[t]hat Altria’s
3 conduct was a substantial factor in causing SFUSD’s harm.”

4 Altria’s proposed instruction is also inaccurate. First, the proposed instruction adopts the
5 framing that an injury or damages has only one cause, but that is not California law. *People v.*
6 *ConAgra Grocery Products Co.*, 17 Cal.App.5th 51, 104 (Cal. App. 6th Dist. 2017) (“Under these
7 circumstances, the trial court could have reasonably concluded that defendants’ promotions, which
8 were a substantial factor in creating the current hazard, were not too remote to be considered a legal
9 cause of the current hazard even if the actions of others in response to those promotions and the
10 passive neglect of owners also played a causal role.”); CACI 431. Second, a defendant *can* be liable
11 for “injury or damages caused by ... third parties,” if the defendant’s conduct was a substantial
12 factor in producing the harm. This instruction essentially asks the Court to instruct the jury that
13 superseding causes exist as a matter of law.

1 **[Contested, Altria-Proposed] Public Nuisance – Injury to Property**

2 **ALTRIA’S PROPOSAL:**

3 SFUSD must prove that its property was injuriously affected by Altria’s conduct. An injury
4 to property consists in depriving its owner of the benefit of it, which is done by taking, withholding,
5 deteriorating, or destroying it.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction is an accurate statement of law. Plaintiff argues that they have
8 standing to sue because “SFUSD is a person who suffered property damage under the first sentence
9 of Cal. Civ. Proc. Code § 731” Dkt. 3349 Plaintiff’s Opposition to JLI’s Motion for Summary
10 Judgment at 3. Accordingly, Plaintiff must be able to prove that there was injury to its property, a
11 phrase which is defined by California’s Code of Civil Procedure. Cal. Civ. Proc. Code § 731 (“An
12 action may be brought by any person whose property is injuriously affected, or whose personal
13 enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the
14 judgment in that action the nuisance may be enjoined or abated as well as damages recovered
15 therefor.”); Cal. Code Civ. Proc. 28 (“An injury to property consists in depriving its owner of the
16 benefit of it, which is done by taking, withholding, deteriorating, or destroying it.”).

17 **PLAINTIFF’S POSITION:**

18 Altria does not explain why this instruction is necessary given that the jury will already
19 have been instructed by the elements instruction that it must find “[t]hat SFUSD’s property was
20 injuriously affected, or whose personal enjoyment was lessened by the nuisance.”

21 Altria’s instruction is also missing the language from Section 731 permitting a claim when
22 “personal enjoyment is lessened.” Cal. Civ. Proc. Code § 731; *see* Doc. 3349 (Pls. S.J. Opp’n) at
23 113 (SFUSD has standing to bring a public nuisance claim under the first sentence [of § 731],
24 because its property has been injured and its enjoyment lessened through disruption in its operations
25 as a result of the public health crisis of youth vaping.”). Injury to property also includes “an injury
26 specifically referable to the use and enjoyment of [the plaintiff’s] land.” *Koll-Irvine Ctr. Prop.*
27 *Owners Assn. v. County of Orange*, 24 Cal. App. 4th 1036, 1041 (1994). There need not be direct
28 damage or loss of use to constitute the necessary interference. *Andrews v. Plains All Am. Pipeline*,

1 *L.P.*, No. 15-4113, 2020 WL 1650031, at *4 (C.D. Cal. Mar. 17, 2020). For example, noise, smoke,
2 vibrations, and odors constitute property damage under California law. *Id.*

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[Contested, Competing Proposals] Negligence – Essential Factual Elements

PLAINTIFF’S PROPOSAL:

Plaintiff claims that it was harmed by Altria’s negligence. To establish this claim, SFUSD must prove all of the following:

1. That Altria was negligent;
2. That SFUSD was harmed; and
3. That Altria’s negligence was a substantial factor in causing SFUSD’s harm.

ALTRIA’S PROPOSAL:

Plaintiff claims that it was harmed by Altria’s negligence. To establish this claim, SFUSD must prove all of the following:

1. That Altria was negligent;
2. That SFUSD was harmed; and
3. That Altria’s negligence was the cause of SFUSD’s harm.

PLAINTIFF’S POSITION:

Plaintiff’s proposed instruction is a verbatim reproduction of CACI 400. Altria has altered the pattern instruction to provide that Altria’s negligence needs to be “the cause” of SFUSD’s harm, rather than merely a “substantial factor” in causing the harm. This is legal error. A defendant’s negligence need only be a substantial factor in causing harm, not “the cause” of the plaintiff’s harm. CACI 400; CACI 430 (causation instruction); *see, e.g., Eisenbise v. Crown Equip. Corp.*, 260 F. Supp. 3d 1250, 1267 (S.D. Cal. 2017) (“A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.”) (citation omitted). Altria says that its additional (unnecessary) causation instructions clear up the confusion, but even if true, that is not a justification for introducing inaccurate statements of the law.

ALTRIA’S POSITION:

Altria’s proposed instruction is an accurate statement of the law. The language is closely derived from Cal. Civil Jury Instruction 400 – “Negligence, essential factual elements.” Altria below proposes separate instructions on causation for negligence claims that explain this

1 requirement. Accordingly, there is no reason to be specific about what causation requires in the
2 context of this more general instruction setting forth the elements of negligence. Moreover, even
3 if there was a reason to provide more detail concerning the causation requirement for negligence
4 claims in this instruction, Altria objects to the Plaintiff's language because it refers only to the
5 requirement that the negligence be a substantial factor in causing Plaintiff's harm. Plaintiff also
6 must prove that Altria's conduct was the legal cause of Plaintiff's harm. *See Ethan Young, v. Dexter*
7 *Watson et al.*, 2017 WL 6621233 (Cal. Super. 2017) (instructing jury on cause in fact and legal
8 cause); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) ("Proximate cause 'limits the
9 defendant's liability to those foreseeable consequences that the defendant's negligence was a
10 substantial factor in producing.'"). Accordingly, if the Court is inclined to include the "substantial
11 factor" language in the Plaintiff's proposal it should also provide not only that "Altria's negligence
12 was a substantial factor in causing SFUSD's harm" but also that it was a "legal cause of that harm."

Negligence – Basic Standard of Care³⁷

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in Altria's situation.

³⁷ CACI 401

[Contested, Altria-Proposed] Duty of Care Required

ALTRIA’S PROPOSAL:

Altria can only be liable for negligence if it assumed a duty of care toward the Plaintiff. In order to find that Altria assumed a duty of care toward Plaintiff, you must find that Altria’s conduct put Plaintiff directly at risk of suffering injury and that Plaintiff’s harm was closely tied to Altria’s actions. If you conclude that Altria did not assume a duty of care toward Plaintiff, Altria would not be liable for negligence.

ALTRIA’S POSITION:

Although the question of duty is often a legal one, this Court has previously concluded in this litigation that the question of duty raises “matters for the jury to evaluate.” Order on Defs. Motions for Summary Judgment Regarding B.B., ECF 3083 (Apr. 29, 2022); *see also Modisette v. Apple Inc.*, 30 Cal. App. 5th 136, 143 (2018) (“A plaintiff in any negligence suit must demonstrate a legal duty to use due care”); *id.* (“Courts . . . invoke[] the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act”).

PLAINTIFF’S POSITION:

It is not appropriate to instruct the jury on the duty element. Duty “is a legal issue and must be determined by the court.” *Mega RV Corp. v. HWH Corp.*, 225 Cal. App. 4th 1318, 1339 (2014) (citation omitted). As a general matter, duty does not turn “on case-specific facts” but instead reflects a judicial determination on “the category of negligent conduct at issue.” *Cabral v. Ralphs Grocery Store Co.*, 51 Cal. 4th 764, 773 (2011); *see also id.* at 774 (“To base a duty ruling on the detailed facts of a case risks usurping the jury’s proper function of deciding what reasonable prudence dictates under those particular circumstances.”). For this reason, the California pattern jury instruction do not include duty instructions.

California arguably recognizes an exception to this rule where duty is a function of specific fact questions. *See O’Malley v. Hospitality Staffing Sols.*, 20 Cal. App. 5th 21, 27 (2018) (“[U]nder a negligent undertaking theory of liability, the scope of a defendant’s duty presents a jury issue when there is a factual dispute as to the nature of the undertaking.”). Here, the duty analysis rests on standard considerations of foreseeability and public policy that are legal questions for the Court

1 to consider. *See Kaney v. Custance*, 74 Cal. App. 5th 201, 215 (2022) (“Foreseeability is a question
2 of law.”); *Carter v. Nat’l R.R. Passenger Corp.*, 63 F. Supp. 3d 1118, 1146 (N.D. Cal. 2014) (“[A]
3 court’s task—in determining “duty”—is not to decide whether a particular plaintiff’s injury was
4 reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more
5 generally whether the category of negligent conduct at issue is sufficiently likely to result in the
6 kind of harm experienced that liability may appropriately be imposed on the negligent party. The
7 jury, by contrast, considers “foreseeability” in two more focused, fact-specific settings. First, the
8 jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the
9 particular defendant’s conduct was negligent in the first place. Second, foreseeability may be
10 relevant to the jury’s determination of whether the defendant’s negligence was a proximate or legal
11 cause of the plaintiff’s injury.”) (quoting *Ballard v. Uribe*, 41 Cal. 3d 564, 572 n.6 (1986)).

12 Altria relies on this Court’s statement in *B.B.*, rejecting Altria’s motion for summary
13 judgment on the duty element, that Altria’s actions were “matters for the jury to evaluate.” *In re*
14 *JUUL*, No. 19-2913, 2022 WL 1601418, at *14 (N.D. Cal. Apr. 29, 2022). All that this meant was
15 that the jury could decide, in evaluating breach and causation, whether Altria’s knowledge and
16 actions foreseeably and actually harmed B.B., not that duty was a jury question. In addition, the
17 Court noted, that, while “duty is a matter of law to be determined by the Court, as the summary
18 judgment stage the trial court must view the evidence of foreseeability, risk and burden in the light
19 most favorable to the non-moving party.” *Id.* (citation omitted). Altria is free to revisit its duty
20 arguments on the full record.

1 **[Contested, Altria-Proposed] Negligence – Economic Loss**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s claims are based on economic losses. Altria did not owe SFUSD a duty to guard
4 against economic losses, and thus would not be liable for negligence, unless SFUSD has proven
5 that SFUSD and Altria have a special relationship, meaning that SFUSD was an intended
6 beneficiary of a particular transaction with Altria and was harmed by Altria’s negligence in carrying
7 out that transaction. You should not find a special relationship between the intended beneficiary –
8 here, SFUSD – and Altria unless you find the aim of the transaction between them is to ensure a
9 benefit to SFUSD. You must decide whether SFUSD had a special relationship with Altria.

10 **ALTRIA’S POSITION:**

11 Although the question of duty is often a legal one, this Court has previously concluded in
12 this litigation that the question of duty raises “matters for the jury to evaluate.” Order on Defs.
13 Motions for Summary Judgment Regarding B.B., ECF 3083 (Apr. 29, 2022); *see also Modisette v.*
14 *Apple Inc.*, 30 Cal. App. 5th 136, 143 (2018) (“A plaintiff in any negligence suit must demonstrate
15 a legal duty to use due care”); *id.* (“Courts . . . invoke[] the concept of duty to limit generally
16 the otherwise potentially infinite liability which would follow from every negligent act”).

17 Altria’s proposed instruction also accurately states the law. Where economic loss is
18 claimed, the question of duty involves the determination of factual questions, including whether a
19 special relationship existed between the plaintiff and the defendant. *See Southern California Gas*
20 *Leak Cases*, 7 Cal. 5th 391, 400, 247 Cal. Rptr. 3d 632, 441 P.3d 881 (2019) (internal citations
21 omitted); *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 398-99 (1992); *Biakanja v. Irving*, 49 Cal. 2d
22 647, 650 (1958). A duty of care is not presumed in economic loss cases; rather, a determination
23 whether the plaintiff and defendant have a “special relationship” is required. *Gas Leak Cases*, 7
24 Cal. 5th at 400. This determination, in turn, requires an examination of whether the plaintiff was
25 the intended beneficiary of a particular transaction between them. *Id.*; *Biakanja*, 49 Cal. 2d at
26 650-51. The determination requires “more than mere foreseeability” and fills the need of “setting
27 meaningful limits on liability.” *Gas Leak Cases*, at 401 (discussing *Bily v. Arthur Young & Co.*, 3
28 Cal. 4th 370, 398-99 (1992)).

PLAINTIFF’S POSITION:

It is not appropriate to instruct the jury on the duty element—see argument on related instructions above. Even if it were, Altria’s proposed instruction misstates the applicable analysis. Duty is a multi-factor analysis, not a single question. *See J’Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979) (listing factors); *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, (2019) (noting that the duty analysis “can ... be a subtle enterprise” that “turns on a careful consideration of the sum total of the policy considerations at play”) (citation omitted). Altria’s proposed instruction not only iterates a single factor, but misstates that factor: the question is not whether conduct was intended to benefit the plaintiff, but “*the extent to which*” the conduct was intended to “*affect*” the plaintiff. *S Cal. Gas*, 7 Cal. 5th at 401.

1 **[Contested, Altria-Proposed] Duty of Care – No Duty to Control Others**

2 **ALTRIA’S PROPOSAL:**

3 Altria did not and does not have a legal duty to control the conduct of separate entities or
4 third parties, including JLI and JLI’s officers and directors, or to warn those endangered by such
5 conduct.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction accurately states California law. *Regents of Univ. of Cal. v.*
8 *Superior Court*, 413 P.3d 656, 663-63 (Cal. 2018) (“A person who has not created a peril is not
9 liable in tort merely for failure to take affirmative action to assist or protect another unless there is
10 some relationship between them which gives rise to a duty to act.”) (citation and quotations
11 omitted); *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203 (1982) (“As a general rule, one
12 owes no duty to control the conduct of another, nor to warn those endangered by such conduct.”).
13 This instruction is also necessary and appropriate here given the different entities involved in the
14 design, manufacture, distribution, marketing, and sale of JUUL and those entities’ different alleged
15 conduct and would help explain to the jury that another entity’s negligent conduct, including JLI
16 and the other former Defendants, does not establish that Altria breached a duty or engaged in
17 negligent conduct.

18 **PLAINTIFF’S POSITION:**

19 It is not appropriate to instruct the jury on the duty element—see argument on related
20 instructions above. Even if it were, this proposed instruction lacks a factual basis. Plaintiff’s
21 allegations do not rest on the claim that Altria merely failed to take affirmative action to assist or
22 protect another. This case is about affirmative, unreasonable conduct.

1 **[Contested, Altria-Proposed] Negligence – Breach of Duty of Care Required**

2 **ALTRIA’S PROPOSAL:**

3 If you find that Altria owed a duty of care to Plaintiff, you must also determine if Altria
4 breached the duty of care. A person breaches the duty of care if it fails to act as a similarly situated
5 person would in order to protect others against unreasonable risks of harm. If you conclude that
6 Altria did not breach a duty of care toward Plaintiff, Altria would not be liable for negligence.

7 **ALTRIA’S POSITION:**

8 Altria’s proposed instruction accurately states California law. *Jones v. Awad*, 39 Cal. App.
9 5th 1200, 1208, 252 Cal. Rptr. 3d 596, 603 (2019) (failure to “use the care required of a reasonably
10 prudent [person] acting under the same circumstances” constitutes a breach); *John B. v. Superior*
11 *Ct.*, 38 Cal. 4th 1177, 1188 (2006) (breach requires that defendant fail to use “ordinary care to
12 prevent others being injured as a result of [defendant’s] conduct”).

13 **PLAINTIFF’S POSITION:**

14 This proposed instruction is in part incorrect and in part redundant. It is incorrect in that it
15 informs the jury it must find Altria owed a duty of care. For the reasons explained above in related
16 instructions, duty is a legal question for the court, not for the jury. It is redundant the
17 unobjectionable portions of this instructions are contained within the agreed-upon pattern
18 instruction “Basic Standard of Care” (CACI 401).

1 **[Contested, Altria-Proposed] Negligence – Claim Limited To Altria’s Conduct**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s negligence claim against Altria must be based on Altria’s conduct. Plaintiff
4 cannot establish a negligence claim against Altria based on the conduct of separate entities or third
5 parties, including JLI and JLI’s officers and directors.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction accurately states California law. *Miller Family Tr. v. Nielsen*,
8 2012 WL 13227085, at *4 (C.D. Cal. July 31, 2012) (“Defendants’ liability must be predicated
9 upon their own conduct.”); *Shanghai Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d 995,
10 1009 (N.D. Cal. 2001) (individual defendant’s liability turns on their own conduct and involvement
11 in various alleged schemes); *Lawson v. Safeway Inc.*, 191 Cal. App. 4th 400, 417, 119 Cal. Rptr.
12 3d 366, 379 (2010) (“[T]he defendant may be liable if **his conduct** was ‘a substantial factor’ in
13 bringing about the harm”) (emphasis added); *Michael R. v. Jeffrey B.*, 158 Cal. App. 3d 1059,
14 1068, 205 Cal. Rptr. 312, 319 (Ct. App. 1984) (“[I]t is essential that the defendant’s own conduct
15 was tortious.”). This instruction is also necessary and appropriate here given the different entities
16 involved in the design, manufacture, distribution, marketing, and sale of JUUL and different
17 conduct in which those entities allegedly engaged and would help explain to the jury that a separate
18 entity or party’s negligent conduct does not establish that Altria breached a duty or engaged in
19 negligent conduct.

20 **PLAINTIFF’S POSITION:**

21 This instruction is a factual argument inappropriate for a jury instruction. Other instructions
22 adequately inform the jury that it must find that Altria’s conduct caused harm. Plaintiff’s claim is
23 that Altria and the JLI Defendants acted together to cause the harm. This instruction improperly
24 implies that JLI involvement in Altria’s conduct absolves Altria of liability.

1 **[Contested, Altria-Proposed] Causation**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff’s negligence claim requires proof of two types of causation: cause-in-fact and legal
4 cause.

5 **ALTRIA’S POSITION:**

6 Altria proposes additional language that further clarifies a defendant cannot be liable for
7 remote causes that are too far removed from the alleged injury or that are separated by too many
8 intervening events. This is a well-established principle of California law that is not directly
9 addressed by the model instruction. *See Novak v. Cont’l Tire North America*, 231 Cal. Rptr. 3d
10 324, 328 (Cal. Ct. App. 2018) (requiring both cause in fact and proximate cause, which limits
11 liability according to public policy considerations); *see Ethan Young, v. Dexter Watson et al.*, 2017
12 WL 6621233 (Cal. Super. 2017) (instructing jury on cause in fact and legal cause). Altria’s
13 proposed language follows the language from *Union Pac. R.R. Co. v. Ameron Pole Prods., LLC*,
14 43 Cal. App. 5th 974, 980 (2019) (“To prove causation, the plaintiff must show: (1) that the
15 defendant’s breach of duty was a cause in fact of his or her injury; and (2) that the defendant’s
16 breach was the proximate, or legal, cause of the injury.”). This instruction is also necessary and
17 appropriate here given the Plaintiff’s alleged injuries and the evidence and arguments that Plaintiff
18 is likely to offer at trial. Plaintiff’s alleged harms are based on the actions of students whose use
19 of vapor products is several steps removed from Altria’s allegedly negligent conduct. The jury
20 therefore should be instructed that causation requires more than an attenuated or remote connection
21 between Altria’s conduct and Plaintiff’s purported harm. Plaintiff reads *Mitchell v. Gonzalez*, 54
22 Cal. 3d 1041 (1991), too broadly. *Mitchell* held only that the specific proximate cause instruction
23 in BAJI No. 3.75 was error because the specific language in that instruction was “conceptually and
24 grammatically deficient.” *Id.* at 1052-54.

25 **PLAINTIFF’S POSITION:**

26 Below, the parties have agreed on CACI 430, the pattern substantial factor instruction. This
27 instruction, and the following few instructions, reflect a dispute over whether the jury must also be
28 instructed on proximate cause.

1 California does not instruct juries separately on cause-in-fact and proximate cause. The
2 California Supreme Court has held that giving a proximate cause instruction is legal error, and that
3 instead courts should instruct on “the ‘substantial factor’ test.” *Mitchell v. Gonzalez*, 54 Cal. 3d
4 1041, 1052-53 (1991). This test “subsumes the ‘but for’ test.” *Id.* It also helps the jury resolve (1)
5 “the problem of independent causes,” (2) “where a similar, but not identical result would have
6 followed without the defendant’s act,” and (3) “where one defendant has made a clearly proved by
7 quite insignificant contribution to the result.” *Id.* For this reason, the operative California pattern
8 instructions collapse causation to a single substantial factor instruction. CACI 430.

9 Altria argues that Plaintiff misstates the holding of *Mitchell*, but the court there specifically
10 rejected a proximate cause instruction in favor of a substantial factor instruction: “Use of BAJI No.
11 3.76 [substantial factor] will avoid much of the confusion inherent in BAJI No. 3.75 [proximate
12 cause]. It is intelligible and easily applied. We therefore conclude that BAJI No. 3.75, the so-called
13 proximate cause instruction, should be disapproved and that the court erred when it refused to give
14 BAJI No. 3.76 and instead gave BAJI No. 3.75.” *Id.* at 1054. If Altria were correct on this point,
15 then why would the pattern instructions provide only for a substantial factor instruction?
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[Contested, Altria-Proposed] Cause In Fact

ALTRIA’S PROPOSAL:

Altria’s conduct would be a cause-in-fact of the Plaintiff’s injury if, as a factual matter, it was a substantial factor in causing Plaintiff’s alleged injury.

ALTRIA’S POSITION:

Altria proposes additional language that further clarifies a defendant cannot be liable for remote causes that are too far removed from the alleged injury or that are separated by too many intervening events. This is a well-established principle of California law that is not directly addressed by the model instruction. *See Novak v. Cont’l Tire North America*, 231 Cal. Rptr. 3d 324, 328 (Cal. Ct. App. 2018) (requiring both cause in fact and proximate cause, which limits liability according to public policy considerations); *see Ethan Young, v. Dexter Watson et al.*, 2017 WL 6621233 (Cal. Super. 2017) (instructing jury on cause in fact and legal cause). Altria’s proposed language follows the language from *Union Pac. R.R. Co. v. Ameron Pole Prods., LLC*, 43 Cal. App. 5th 974, 980 (2019) (“To prove causation, the plaintiff must show: (1) that the defendant’s breach of duty was a cause in fact of his or her injury; and (2) that the defendant’s breach was the proximate, or legal, cause of the injury.”). This instruction is also necessary and appropriate here given the Plaintiff’s alleged injuries and the evidence and arguments that Plaintiff is likely to offer at trial. Plaintiff’s alleged harms are based on the actions of students whose use of vapor products is several steps removed from Altria’s allegedly negligent conduct. The jury therefore should be instructed that causation requires more than an attenuated or remote connection between Altria’s conduct and Plaintiff’s purported harm. Plaintiff reads *Mitchell v. Gonzalez*, 54 Cal. 3d 1041 (1991), too broadly. *Mitchell* held only that the specific proximate cause instruction in BAJI No. 3.75 was error because the specific language in that instruction was “conceptually and grammatically deficient.” *Id.* at 1052-54.

PLAINTIFF’S POSITION:

California does not instruct juries separately on cause-in-fact. Instead, the operative California pattern instructions collapse causation to a single substantial factor instruction. CACI 430. The liability elements already tell the jury it must find substantial factor causation, so this

1 proposed instruction adds nothing. *See Mitchell v. Gonzalez*, 54 Cal. 3d 1041, 1052-53 (1991)
2 (substantial factor “subsumes the ‘but for’ test.”).

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Causation – Substantial Factor³⁸

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

³⁸ CACI 430

[Contested, Plaintiff-Proposed] Causation – Multiple Causes

PLAINTIFF’S PROPOSAL:

A person’s negligence may combine with another factor to cause harm. If you find that Altria’s negligence was a substantial factor in causing Plaintiff’s harm, then Altria is responsible for the harm. Altria cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Plaintiff’s harm.

PLAINTIFF’S POSITION:

The California pattern instructions require that this instruction (CACI 431) be given “[i]n cases of multiple (concurrent dependent) causes,” i.e., where multiple persons cause harm. CACI 430, *Directions for Use*; see also, e.g., *Uriell v. Regents of the Univ. of Cal.*, 234 Cal. App. 4th 735, 746-47 (2015) (“We are also not persuaded CACI No. 431 confused the jury or diluted the standard for causation. The [defendants] conflate the legal concepts of substantial factor for causation and concurrent cause. CACI No. 431 is necessary to explain to the jury a ‘plaintiff need not prove that the defendant’s negligence was the sole cause of plaintiff’s injury in order to recover. Rather it is sufficient that defendant’s negligence is a legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious.’”).

ALTRIA’S POSITION:

Altria objects to this instruction as duplicative of the other causation instructions and potentially confusing to the jury and prejudicial.

[Contested, Altria-Proposed] Legal Cause

ALTRIA’S PROPOSAL:

If you determine that Altria’s conduct was a cause-in-fact of the Plaintiff’s injury, you must decide whether Altria’s conduct was also a legal cause of the Plaintiff’s injury.

A defendant’s conduct is a legal cause of the plaintiff’s injury if the harm giving rise to the action could have been reasonably foreseen or anticipated by a person of ordinary intelligence and care.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with well-established California law that is not directly addressed by the model instruction. *See Ethan Young, v. Dexter Watson et al.*, 2017 WL 6621233 (Cal. Super. 2017) (instructing jury on cause in fact and legal cause); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) (“Proximate cause ‘limits the defendant’s liability to those foreseeable consequences that the defendant’s negligence was a substantial factor in producing.’”). Altria’s proposed language follows the language from *Union Pac. R.R. Co. v. Ameron Pole Prods., LLC*, 43 Cal. App. 5th 974, 980 (2019) (“To prove causation, the plaintiff must show: (1) that the defendant’s breach of duty was a cause in fact of his or her injury; and (2) that the defendant’s breach was the proximate, or legal, cause of the injury.”). This instruction is also necessary and appropriate here given the Plaintiff’s alleged injuries and the evidence and arguments that Plaintiff is likely to offer at trial. Plaintiff’s alleged harms are based on the actions of students whose use of vapor products is several steps removed from Altria’s allegedly negligent conduct. The jury therefore should be instructed that causation requires more than an attenuated or remote connection between Altria’s conduct and Plaintiff’s purported harm. Plaintiff reads *Mitchell v. Gonzalez*, 54 Cal. 3d 1041 (1991), too broadly. *Mitchell* held only that the specific proximate cause instruction in BAJI No. 3.75 was error because the specific language in that instruction was “conceptually and grammatically deficient.” *Id.* at 1052-54.

PLAINTIFF’S POSITION:

California does not instruct juries separately on cause-in-fact and proximate cause. The California Supreme Court has held that giving a proximate cause instruction is legal error, and that

1 instead courts should instruct on “the ‘substantial factor’ test.” *Mitchell v. Gonzalez*, 54 Cal. 3d
2 1041, 1052-53 (1991). That test already tells the jury to rule out any “remote or trivial” causes.

3 Altria argues that Plaintiff misstates the holding of *Mitchell*, but the court there specifically
4 rejected a proximate cause instruction in favor of a substantial factor instruction: “Use of BAJI No.
5 3.76 [substantial factor] will avoid much of the confusion inherent in BAJI No. 3.75 [proximate
6 cause]. It is intelligible and easily applied. We therefore conclude that BAJI No. 3.75, the so-called
7 proximate cause instruction, should be disapproved and that the court erred when it refused to give
8 BAJI No. 3.76 and instead gave BAJI No. 3.75.” *Id.* at 1054. If Altria were correct on this point,
9 then why would the pattern instructions provide only for a substantial factor instruction?

1 **[Contested, Altria-Proposed] Legal Cause Cannot Be Remote or Indirect**

2 **ALTRIA’S PROPOSAL:**

3 Legal cause requires a direct connection between the injury asserted and Altria’s allegedly
4 wrongful conduct. Legal cause would not exist if you do not find a direct relation between the
5 injury asserted and Altria’s specific conduct.

6 **ALTRIA’S POSITION:**

7 This instruction accurately states the law. *See* CACI 430 (“A substantial factor in causing
8 harm is a factor that a reasonable person would consider to have contributed to the harm. It must
9 be more than a remote or trivial factor. It does not have to be the only cause of the harm.”); *Ozeran*
10 *v. Jacobs*, 2018 WL 1989525, at *7 (C.D. Cal. 2018) (dismissing negligence claims where
11 economic harm was “too attenuated to meet the directness requirement for proximate cause”), *aff’d*,
12 798 F. App’x 120 (9th Cir. 2020); *Oregon Laborers-Emp. Health & Welfare Tr. Fund v. Philip*
13 *Morris Inc.*, 185 F.3d 957, 965 (9th Cir. 1999) (“The difficulty of ascertaining the damages
14 attributable to defendants’ alleged wrongful conduct and the complexity involved in calculating
15 these damages weigh heavily, if not dispositively, in favor of barring plaintiffs’ actions.”); *In re*
16 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 349 F. Supp. 3d 881, 906
17 (N.D. Cal. 2018); *The Ratcliff Architects v. Vanir Constr. Mgmt., Inc.*, 88 Cal. App. 4th 595, 607,
18 106 Cal. Rptr. 2d 1, 9 (2001). This instruction is also necessary and appropriate here given the
19 Plaintiff’s alleged injuries and the evidence and arguments that Plaintiff is likely to offer at trial.
20 Plaintiff’s alleged harms are based on the actions of students whose use of vapor products is several
21 steps removed from Altria’s allegedly negligent conduct. The jury therefore should be instructed
22 that causation requires more than an attenuated or remote connection between Altria’s conduct and
23 Plaintiff’s purported harm. In addition, this instruction is necessary and appropriate given the lack
24 of evidence linking SFUSD’s injuries to Altria’s conduct. The jury should be informed that an
25 attenuated, indirect, and remote link between Altria and SFUSD, even if one could be established,
26 is not sufficient to demonstrate causation as necessary to support liability. Plaintiff reads *Mitchell*
27 *v. Gonzalez*, 54 Cal. 3d 1041 (1991), too broadly. *Mitchell* held only that the specific proximate
28 cause instruction in BAJI No. 3.75 was error because the specific language in that instruction was

1 “conceptually and grammatically deficient.” *Id.* at 1052-54.

2 **PLAINTIFF’S POSITION:**

3 California does not instruct juries separately on cause-in-fact and proximate cause. The
4 California Supreme Court has held that giving a proximate cause instruction is legal error, and that
5 instead courts should instruct on “the ‘substantial factor’ test.” *Mitchell v. Gonzalez*, 54 Cal. 3d
6 1041, 1052-53 (1991).

1 **[Contested, Altria-Proposed] Causation – Time of Misconduct**

2 **ALTRIA’S PROPOSAL:**

3 Conduct that occurred after a harm took place cannot be the cause-in-fact or legal cause of
4 a harm.

5 **ALTRIA’S POSITION:**

6 This instruction accurately states the law. *See, e.g., Novak v. Cont'l Tire N. Am.*, 22 Cal.
7 App. 5th 189, 197 (2018) (“[A] defendant’s ‘conduct may be held not to be a legal cause of harm
8 to another where after the event and looking back from the harm to the actor’s negligent conduct,
9 it appears to the court highly extraordinary that it should have brought about the harm.’”) (quoting
10 Rest.2d, Torts, § 435(2)); *State Dep’t of State Hosps. v. Superior Ct.*, 61 Cal. 4th 339, 352 (2015)
11 (“An act is a cause in fact if it is a necessary antecedent of an event.”). This instruction also is
12 appropriate and necessary given the claims and evidence in this case. Plaintiff’s factual allegations
13 and evidence concerning Altria are limited to a discrete period of time that began well after JUUL
14 was introduced and well after Plaintiff claims to have been injured. This instruction is therefore
15 needed to help to avoid juror confusion and to help ensure that the jury does not award damages
16 against Altria based on conduct for which Altria cannot be liable. SFUSD’s objection that the
17 instruction has no factual basis because its “injury is current and ongoing” pre-judges the evidence
18 and amounts to a premature request for judgment as a matter of law on a discrete issue before trial
19 even begins. Plaintiff reads *Mitchell v. Gonzalez*, 54 Cal. 3d 1041 (1991), too broadly. *Mitchell*
20 held only that the specific proximate cause instruction in BAJI No. 3.75 was error because the
21 specific language in that instruction was “conceptually and grammatically deficient.” *Id.* at 1052-
22 54.

23 **PLAINTIFF’S POSITION:**

24 This proposed instruction has no basis in the California pattern instructions. Those pattern
25 instructions adequately instruct the jury that it must find Altria’s negligence was a substantial factor
26 in causing SFUSD harm. This proposed instruction references terms like “cause-in-fact” and “legal
27 cause” when those are not portions of the California jury instructions and, indeed, it would be legal
28 error to instruct in that fashion. *Mitchell v. Gonzalez*, 54 Cal. 3d 1041, 1052-53 (1991).

1 This proposed instruction also lacks a factual basis. Here, SFUSD's injury is current and
2 ongoing, so there is no factual basis to instruct the jury on conduct that post-dated the harm.

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1 **[Contested, Altria-Proposed] Negligence – Liability Limited to Harm Caused**

2 **ALTRIA’S PROPOSAL:**

3 A defendant who is liable in nuisance or negligence is liable only for the portion of injuries
4 or damages that was caused by that defendant’s conduct. Altria therefore is not liable for injuries
5 or damages caused by separate entities, including JLI and JLI’s officers and directors, Plaintiff, or
6 by other third parties, including other companies that manufacturer or sell other brands of vapor
7 products or other products more generally.

8 **ALTRIA’S POSITION:**

9 This instruction accurately states the law. *B.B. v. Cnty. of Los Angeles*, 10 Cal. 5th 1, 14,
10 471 P.3d 329, 338 (2020) (“[L]iability for damage will be borne by those whose negligence caused
11 it in direct proportion to their respective fault’ . . . meaning ‘the amount of [their] negligence.’”) (internal citation and quotation omitted). This instruction is also necessary and appropriate given
12 the number of entities and third parties that may have contributed to vapor use by students at
13 Plaintiff’s schools. Providing a separate instruction on liability being limited to harm caused will
14 help avoid juror confusion.

15 **PLAINTIFF’S POSITION:**

16 To the extent this instruction is accurate, it is redundant with the California pattern
17 instructions on comparative fault. It is also inaccurate. First, the proposed instruction adopts the
18 framing that an injury or damages has only one cause, but that is not California law. *See Uriell v.*
19 *Regents of the Univ. of Cal.*, 234 Cal. App. 4th 735, 746-47 (2015) (“[A] plaintiff need not prove
20 that the defendant’s negligence was the sole cause of plaintiff’s injury in order to recover. Rather
21 it is sufficient that defendant’s negligence is a legal cause of injury, even though it operated in
22 combination with other causes, whether tortious or nontortious.”). Second, a defendant *can* be liable
23 for “injury or damages caused by ... third parties,” if the defendant’s conduct was a substantial
24 factor in producing the harm. This instruction essentially asks the Court to instruct the jury that
25 superseding causes existed as a matter of law.
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Negligence – Reliance on Good Conduct of Others³⁹

Every person has a right to expect that every other person will use reasonable care and will not violate the law, unless that person knows, or should know, that the other person will not use reasonable care or will violate the law.

³⁹ CACI 411

RICO – Introduction

Plaintiff claims that Altria is liable to SFUSD under the RICO statute.

I will now instruct you on the elements of Plaintiff's RICO claim. As relevant here, there are two different ways to violate RICO: (1) conducting the affairs of an enterprise through a pattern of racketeering or (2) conspiring to do so. Plaintiff alleges both theories. Plaintiff alleges that Altria participated in a fraud scheme and conspired with several individuals who worked as officers or directors of JLI. Those individuals are named James Monsees, Adam Bowen, Nicholas Pritzker, Hoyoung Huh, and Riaz Valani.

Plaintiff alleges that the RICO enterprise is JLI. Plaintiff alleges that James Monsees, Adam Bowen, Nicholas Pritzker, Hoyoung Huh, and Riaz Valani began conducting the affairs of the enterprise through a pattern of racketeering activity or conspiring to do so in 2015 or earlier. Plaintiff alleges that Altria began conducting the affairs of the enterprise through a pattern of racketeering activity, or conspiring to do so, in 2017.

RICO – Conducting the Affairs of An Enterprise – Elements⁴⁰

Plaintiff first alleges that Altria conducted or participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity.

Plaintiff must prove each of the following elements by a preponderance of the evidence:

First, an enterprise existed.

Second, Altria was employed by or associated with the enterprise.

Third, Altria conducted or participated, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity. To conduct or participate means that Altria had to be involved in the operation or management of the enterprise; and

Fourth, Altria's conduct or participation in the enterprise was a cause of Plaintiff's injury to business or property.

⁴⁰ *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 58

1 **[Contested, Competing Proposals] RICO – Enterprise**

2 **PLAINTIFF’S PROPOSAL:**

3 An enterprise includes any legal entity, such as a partnership, corporation, or association.
 4 The Plaintiff has charged that the enterprise in this case is JLI. If you find that JLI was, in fact, a
 5 legal entity, such as a partnership, corporation, or association, then you may find that an enterprise
 6 existed.

7 **ALTRIA’S PROPOSAL:**

8 An enterprise includes any legal entity, such as a partnership, corporation, or association.
 9 The Plaintiff has charged that the RICO enterprise in this case is JLI, a corporation, conducting its
 10 affairs through a pattern of racketeering activity.

11 **PLAINTIFF’S POSITION:**

12 See Modern Federal Jury Instructions (Civil Volumes) Instruction 84-24 (March 2022). The
 13 Court should follow the pattern federal jury instructions. JLI attempts to conflate issues by invoking
 14 the pattern of racketeering activity, which is a separate element of a RICO claim. The instruction
 15 is directed only to the direction of an enterprise, so Plaintiff’s proposal is on point, while Altria’s
 16 proposal is confusing.

17 Altria’s position that an enterprise cannot exist to carry out a corporation’s activities is
 18 directly contrary to Supreme Court authority. That was the precise issue in *Cedric Kushner*
 19 *Promotions, Ltd. v. King*, 533 U.S. 158 (2001), and the Supreme Court allowed the claim based on
 20 Don King’s fraudulent conduct through his corporation. See *id.* at 163 (holding that RICO claim
 21 was valid in “circumstances in which a corporate employee, acting within the scope of his authority,
 22 allegedly conducts the corporation’s affairs in a RICO-forbidden way”).

23 **ALTRIA’S POSITION:**

24 Altria objects to portions of the Plaintiff’s proposed instruction as contrary to the law,
 25 incomplete, and prejudicial. Subject to these objections, Altria provides its own proposal for this
 26 instruction, which is more appropriate than the Plaintiff’s proposal for the reasons set forth below.

27 The first sentence is the same in Altria’s proposal and Plaintiff’s proposal. The second
 28 sentence is the same except for language added by Altria that states that the RICO enterprise refers

1 to JLI acting “through a pattern of racketeering activity.” In addition, Altria deletes the last
 2 sentence in Plaintiff’s proposal to remove language suggesting that a finding that JLI is a
 3 corporation necessarily means that JLI is an enterprise. The changes reflected in Altria’s proposed
 4 instruction are necessary to provide an accurate description of what qualifies as a RICO enterprise.
 5 By contrast, Plaintiff’s proposed instruction would tell the jury that every “corporation” is a RICO
 6 enterprise. Such an instruction misstates RICO law and would be prejudicial to Altria and
 7 confusing to the jury.

8 Contrary to the Plaintiff’s proposed definition, a “corporation carrying out its own activities
 9 (even fraudulent ones) only through its agents and employees does not constitute an enterprise.” *In*
 10 *re: General Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *12 (S.D.N.Y. Jul. 15, 2016).
 11 For that reason, “[n]ot every business fraud case is a RICO case,” and courts decline to find a RICO
 12 enterprise when the RICO defendants merely conducted the “normal business activity” of the
 13 corporate entity. *Cisneros v. Petland, Inc.*, 341 F. Supp. 3d 1365, 1372 (N.D. Ga. 2018), *aff’d in*
 14 *relevant part*, 972 F.3d 1204 (11th Cir. 2020); *see also Gardner v. Starkist Co.*, 418 F. Supp. 3d
 15 443, 461 (N.D. Cal. 2019) (fraudulent marketing, advertising, and labeling of tuna as sustainably
 16 sourced was “routine commercial dealing” that could not be converted into “a RICO enterprise” by
 17 characterizing it as such); *Ferrari v. Mercedes-Benz USA, LLC*, No. 15-CV-04379, 2016 WL
 18 7188030, at *3-4 (N.D. Cal. Dec. 12, 2016) (dismissing RICO claims where complaint failed to
 19 allege conduct by defendants distinct from their roles as officers and employees of the companies
 20 alleged to be RICO enterprises); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1357 (11th Cir. 2016)
 21 (“[A] corporate defendant acting through its officers, agents, and employees is simply a
 22 corporation. Labeling it as an enterprise as well would only amount to referring to the corporate
 23 ‘person’ by a different name.” (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161
 24 (2001))). By contrast, in the few cases where a legal entity was alleged to be the RICO enterprise,
 25 plaintiffs instead allege an entity in which the members of that enterprise have infiltrated or seized
 26 a legitimate firm and used it to achieve or magnify their unlawful ends. *See Fitzgerald v. Chrysler*
 27 *Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (collecting cases).

28 Altria’s proposed instruction is also consistent with this Court’s prior rulings. The Court

1 recognized Plaintiff's enterprise theory turned on whether the RICO defendants "were operating
2 merely in the 'ordinary course' of JLI's business or were pursuing separate Enterprise goals through
3 JLI" and explained that Plaintiff must prove "the existence of a distinct Enterprise, separate and
4 apart from the general business of JLI." *In re JUUL Labs, Inc., Mktg., Sales Practices, and Prods.*
5 *Liab. Litig.*, 533 F. Supp. 3d 858, 869 (N.D. Cal. 2021). Altria's proposed instruction is therefore
6 necessary and appropriate given the Plaintiff's theory of enterprise here. Plaintiff ignores the
7 Court's prior ruling. Plaintiff also seeks to create a distinction between the RICO enterprise and
8 the pattern of racketeering activity. Given the theory of enterprise in this case, this distinction is
9 illusory and would be confusing and prejudicial to Altria.

RICO – Association with the Enterprise⁴¹

With regard to the element that Altria must have been associated with or employed by the enterprise:

It is required that at some time during the relevant time period, Altria was employed by, or associated with, the enterprise.

⁴¹ *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 60

1 **[Contested, Competing Proposals] RICO – Conducting or Participating in the Enterprise**
 2 **PLAINTIFF’S PROPOSAL:**

3 With regard to the element that Altria conducted or participated in the conduct of the
 4 enterprise through that pattern of racketeering activity:

5 To conduct or participate in the conduct of the enterprise means that Altria must have played
 6 some part in the operation or management of the enterprise. Plaintiff is not required to prove that
 7 Altria was a member of upper management. An enterprise is operated not only by those in upper
 8 management, but also those lower down in the enterprise who act under the direction of upper
 9 management. An enterprise also might be operated or managed by others associated with the
 10 enterprise who exert some degree of influence or direction over it due to their position or power.

11 Altria need not have participated in, or been aware of, all of the enterprise’s activities; it is
 12 sufficient if it was involved in the operation or management of some of the enterprise’s activities.

13 **ALTRIA’S PROPOSAL:**

14 Plaintiff must prove that Altria conducted or participated in conducting the affairs of the
 15 enterprise through a pattern of racketeering activity.

16 To make this showing, Plaintiff must prove that Altria played some part in the operation or
 17 management of that enterprise.

18 **PLAINTIFF’S POSITION:**

19 Plaintiff’s proposed instruction reflects the key language laid out by the Supreme Court in
 20 *Reves v. Ernst & Young*, 507 U.S. 170 (1993). There, the Court explained that RICO’s conduct test
 21 requires “some degree of direction” and “some part in that direction,” and that the phrase “operation
 22 or management” is “a formulation that is easy to apply.” *Id.* at 179. Both sides agree that the jury
 23 should be instructed on this standard. Plaintiffs’ proposed instruction adds, however, the critical
 24 gloss *Reves* added regarding how the standard applies. Specifically, “[a]n enterprise is ‘operated’
 25 not just by upper management but also by lower rung participants in the enterprise who are under
 26 the direction of upper management.” *Id.* at 184. And in addition, “[a] enterprise also might be
 27 “operated” or “managed” by others “associated with” the enterprise who exert control over it as,
 28 for example, by bribery.” *Id.* It is clear that by “control,” the Supreme Court did not mean “legal

control,” as a bribe does not give the briber legal control over the bribed. Instead, a bribe gives the briber influence and power.

Plaintiff’s last sentence, regarding operation or management of some of the enterprise’s activities, reflects the instructions given in *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 57, the relevant portions of the judgment in which were affirmed on appeal. *Planned Parenthood Fed. of Am., Inc. v. Newman*, 51 F. 4th 1125 (9th Cir. 2022); *Planned Parenthood Fed. of Am., Inc. v. Newman*, No. 20-16068, 2022 WL 13613963 (9th Cir. Oct. 21, 2022). That instruction was in turn based on Modern Federal Jury Instructions (Civil Volumes) Instruction 84-27 (March 2022). This is a correct point of law, and Altria does not argue otherwise. Altria asserts that the Plaintiff’s theory is different from that in *Planned Parenthood*, but none of the distinctions Altria identifies change the *Reves* test as to what constitutes “operation or management” of an enterprise, and the jury should be so instructed.

ALTRIA’S POSITION:

Altria objects to portions of the Plaintiff’s proposed instruction as contrary to the law, incomplete, and prejudicial. Altria discusses the basis for these objections in more detail below and explains why Altria’s own proposal is more appropriate than the Plaintiff’s proposal.

Altria’s proposed instruction is consistent with and supported by ample RICO case law. 18 U.S.C. § 1962(c). As the Supreme Court has held, “one is not liable under that provision unless one has participated in the operation or management of the enterprise itself.” *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). In addition, the proposed instruction is also necessary and appropriate here to explain the requirement that Altria has conducted or participated in conducting the affairs of the alleged enterprise and what that requirement means in the context of Plaintiff’s RICO claims in this case. Altria also proposes additional instructions on this requirement that render the second paragraph in Plaintiff’s proposed instruction unnecessary.

Plaintiff’s response to Altria’s proposal asks the Court to adhere to the instruction given in the *Planned Parenthood* case. Plaintiff also objects to Altria’s proposal because it departs from the instruction given in the *Planned Parenthood* case. Altria acknowledges that this Court tried RICO claims in *Planned Parenthood* based on alleged violations of sections 1962(c) and 1962(d)

1 involving an association-in-fact enterprise, and that certain instructions or portions of instructions
 2 given in *Planned Parenthood* might be instructive in this case. Altria has adopted language from
 3 and agreed to language included in the *Planned Parenthood* instructions, including language in
 4 their proposed instruction here. At the same time, the Court should not adhere to its instructions in
 5 *Planned Parenthood* as closely as Plaintiff proposes because this case is fundamentally different
 6 from *Planned Parenthood* in many significant respects.

7 The legal issues presented by the Plaintiff's RICO claims and theory of RICO liability in
 8 *Planned Parenthood* are drastically different from the claims and theory at issue here. In *Planned*
 9 *Parenthood*, Plaintiff alleged that the defendants comprised an "association-in-fact" enterprise. In
 10 this case, by contrast, the Court rejected Plaintiff's effort to bring claims based on an "association-
 11 in-fact" enterprise at the pleading stage. *In re JUUL Labs, Inc.*, 497 F. Supp. 3d at 598-603
 12 ("[P]laintiffs have not plausibly alleged the existence of a distinct Enterprise, separate and apart
 13 from the general business of JLI."). Plaintiff therefore relies on a theory of enterprise that claims
 14 that JLI, a corporation, was the enterprise and the member of that enterprise is one of JLI's
 15 investors. This theory raises complex factual questions for the jury's consideration concerning
 16 Altria's conduct and any role in an alleged enterprise that were not present in *Planned Parenthood*.
 17 As just an example, Altria engaged in JUUL-related conduct and had relationships with JLI that
 18 cannot support RICO liability, which necessitates more detailed instructions concerning what
 19 actions do, and which do not, meet RICO's "conduct or participate in conducting" requirement.
 20 Likewise, Altria's relationships with one another and with JLI require greater clarity concerning
 21 the elements necessary to establish a RICO conspiracy. Plaintiffs make no attempt to explain why
 22 jury instructions from an association-in-fact case are applicable to their enterprise theory here,
 23 particularly when they argued throughout their summary judgment briefing that association-in-fact
 24 case law is inapplicable to an enterprise theory claim.

25 The pattern of racketeering activity that was tried and considered by the jury in *Planned*
 26 *Parenthood* also was fundamentally different from the alleged racketeering acts that are presented
 27 in this case. In *Planned Parenthood*, the theory of RICO that was tried before a jury was based on
 28 alleged predicate acts of "us[ing] the internet to secure two [] IDs, the defendants intended to affect

1 interstate commerce in creating the false IDs, and the defendants used those IDs across state
 2 lines.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d at
 3 650. The alleged pattern of racketeering activity was short in time and narrow in scope and
 4 included only a few discrete acts. *See id.* In this case, by contrast, Plaintiff’s RICO claims are
 5 based on alleged acts of mail and wire fraud, which are predicate acts with more complex
 6 requirements that need to be explained to the jury as in Altria’s instruction. Plaintiff’s allegations
 7 also describe purported racketeering activity that is broader in scope and included a far greater
 8 number of supposed acts than the allegations did in *Planned Parenthood*.

9 Furthermore, in *Planned Parenthood*, plaintiff argued that the pattern of racketeering
 10 activity was open-ended and therefore sufficient to constitute a continuous pattern. *Id.* at 651. In
 11 this case, Plaintiff will likely rely on closed-ended continuity, since the alleged racketeering activity
 12 took place over a longer period of time and the racketeering activity has ceased.

13 The alleged injuries to business or property in *Planned Parenthood* also were different from
 14 those at issue here, turned on different evidence, and necessarily raised completely different issues.
 15 In *Planned Parenthood*, the alleged harm focused on discrete financial costs that had been directly
 16 caused by the purported racketeering activity. *See id.* at 652 (explaining damages were limited to
 17 those that were “much more directly tied to defendants’ conduct”). Plaintiff’s alleged injuries in
 18 this case are nowhere near so well-defined. Plaintiff identifies a handful of impacts on certain
 19 school property. But it also seeks a range of remedies for supposed costs in the future that it might
 20 or might not incur. And unlike the “direct” theory of causation at issue in *Planned Parenthood*, any
 21 connection in this case between an injury to Plaintiff’s business or property and the alleged pattern
 22 of racketeering activity would be attenuated and indirect.

23 Given the many obvious distinctions between this case and *Planned Parenthood*, Plaintiff’s
 24 wholesale reliance on the final instructions in *Planned Parenthood* for the instructions in this case
 25 is misplaced, and the Court should decline Plaintiff’s request to adopt the instruction given in
 26 *Planned Parenthood* here. The Ninth Circuit does “not require trial judges to use . . . specific
 27 language approved in prior cases.” *United States v. Pena-Ozuna*, 511 F.2d 1106, 1108 (9th Cir.
 28 1975). Indeed, even “standard instructions may not always pass muster” *Id.* The question

1 here is not what the Court found appropriate in *Planned Parenthood*, it what instructions are
2 necessary to ensure that the “jury [is] fairly instructed on the issue.” *Id.* That question cannot be
3 answered without considering the theories of RICO and RICO claims, defenses, and evidence that
4 will be presented to the jury *in this case*. Accordingly, rather than relying on *Planned Parenthood*
5 as binding here, the Court should consider whether, given the claims and evidence in this case, the
6 instruction proposed by Altria accurately states the law and would help explain the issues to the
7 jury and prevent confusion and prejudice. Altria’s proposed instruction meets this standard
8 because, as set forth above, it better explains the Plaintiff’s RICO claim in a manner appropriate
9 for *this case*.

10 Finally, Plaintiff’s objection that this instruction omits certain information that is included
11 in Plaintiff’s proposed instruction about “what it means to be involved in the ‘operation or
12 management’ of the enterprise” is meritless. Altria’s proposed instructions that follow this proposal
13 include additional information concerning the requirement that a defendant “conduct or participate
14 in conducting” the alleged enterprise.

**[Contested, Altria-Proposed] RICO Section 1962(c) – Conducting or Participating in
Conducting an Enterprise**

ALTRIA’S PROPOSAL:

To establish that Altria conducted or participated in conducting the alleged JLI enterprise, Plaintiff must prove that Altria played some part in the operation or management of the enterprise *itself*. This requires Plaintiff to establish that Altria exercised some degree of control over JLI and that Altria conducted or participated in conducting the affairs of JLI *itself* as opposed to actions that were conducting Altria’s own affairs.

ALTRIA’S POSITION:

Altria’s proposed instruction is entirely consistent with RICO case law, which has expressly recognized that conducting or participating in conducting a RICO enterprise requires “some degree of control” over the enterprise. *See, e.g., High v. Choice Mfg. Co.*, No. C-11-5478 EMC, 2012 WL 3025922, at *8 (N.D. Cal. July 24, 2012) (noting courts have emphasized that “direction requires some degree of control” and collecting cases); *see also Dahlgren v. First Nat’l Bank*, 533 F.3d 681, 689-90 (8th Cir. 2008) (noting that 1962(c) requires that the defendant “exercise [] some degree of control over the operation or management of [the enterprise’s affairs]”); *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). Plaintiff is therefore incorrect when arguing that this aspect of Altria’s proposed instruction misstates the law or is improper because it uses the word “control.”

This instruction is also necessary to explain the applicable standard, focus the jury’s attention on the correct issues, and prevent confusion and potential prejudice to Altria, since Altria is a separate corporate entity from JLI. In particular, this instruction is needed to explain that any operation or management by Altria must have been over JLI “itself” and that Altria must have conducted or participated in conducting the affairs of JLI “itself” and not its own affairs. This requirement and specific language comes directly out of the Supreme Court’s decision in *Reves*, which made clear that Section 1962(c) “liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their *own* affairs” and that “‘outsiders’ may be liable under § 1962(c) if they are ‘associated with’ an enterprise and participate in the conduct of *its* affairs—that is, participate in the operation or management of the enterprise

1 itself.” 507 U.S. at 184 (emphases in original). It is also supported by decisions that recognize
 2 “the principle that a corporation acts only through its directors, officers, and agents.” *Cedric*
 3 *Kushner*, 533 U.S. at 165-66 (2001); *see also, e.g., Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir.
 4 2008) (“[T]he general rule of American law is that the board of directors controls a corporation.”);
 5 *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (describing “inability of a
 6 corporation to operate except through its officers”); *Jaguar Cars, Inc. v. Royal Oaks Motor Car*
 7 *Co.*, 46 F.3d 258, 267 (3d Cir. 1995) (“Implicit in the Court’s analysis [in *Reves*] was the
 8 recognition that ‘inside’ managers are the ‘persons’ §1962(c) was designed to reach.”); *Schlafly v.*
 9 *United States*, 4 F.2d 195, 200 (8th Cir. 1925) (“[T]he control of one corporation over another is
 10 ordinarily had by reason of control of the voting stock therein, and not through control of the non-
 11 voting stock.”).

12 Plaintiff’s reliance on *Reves* when objecting to this instruction is misplaced and
 13 unconvincing. As noted, much of the language in Altria’s proposed instruction was taken from that
 14 decision and is necessary here given Plaintiff claims that a corporate outsider should be liable under
 15 section 1962(c) of RICO. And the requirement that Altria exercise some degree of control is further
 16 supported by post-*Reves* decisions that cite and rely on that decision. Nor can Plaintiff distinguish
 17 *Reves* by claiming that its holding is limited to “complete outsiders.” The defendant in *Reves* was
 18 *not* a “complete outsider”; it was an accounting firm that had created financial statements and
 19 presented those statements to the board of directors. In addition, Plaintiff’s argument that *Reves*
 20 does not apply because here Plaintiff’s “RICO claim is based on Altria’s operation of JLI, so there
 21 is no material distinction in this case” between the enterprise and the members of the enterprise
 22 does not make sense, since it is undisputed that Altria and JLI are distinct corporations.

23 Finally, to the extent that Plaintiff argues that this instruction is unnecessary given the
 24 instruction it proposes on the requirement that Altria conducted or participated in conducting the
 25 alleged enterprise, the Court should give Altria’s proposed instruction on that issue rather than the
 26 version Plaintiff proposes. *See supra*. Plaintiff’s only support for its approach—that this Court
 27 gave that instruction in *Planned Parenthood*—does not compel otherwise. The claims, issues,
 28 allegations, and evidence in *Planned Parenthood* were different from those in this case. *See supra*.

Accordingly, rather than simply adopting the instruction in *Planned Parenthood*, the Court should consider whether, given the claims and evidence in this case, the instruction proposed by Altria would better explain the issues to the jury and prevent confusion and prejudice. On this issue, the proposed instruction would do so. Altria's proposed instruction explains the requirement that Altria associate with an enterprise in a more succinct manner that is more appropriate given the Plaintiff's allegation that JLI is the purported RICO enterprise and its members are certain officers and directors and an investor. *See supra*. Plaintiff's proposed instruction also does not make clear that some degree of control over the enterprise is necessary to meet the "conduct or participate in conducting" requirement and therefore would not sufficiently explain this requirement to the jury. Nor is there any reason to credit Plaintiff's baseless assertion that this straightforward instruction would "surely confuse the jury." To the contrary, the proposed instruction would have the opposite impact by helping the jury to understand a complex legal requirement.

PLAINTIFF'S POSITION:

There are two problems with Altria's proposed instruction. *First*, Altria's instruction states that Altria must have exerted "some degree of control over" the enterprise, but "control" is not part of the legal test. The relevant legal question is whether Altria had "some part in directing" the enterprise's affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). As the Supreme Court made clear, Altria need not have been an upper management participant to conduct or participate in the enterprise's affairs. *Id.* at 184. In fact, "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.* It would be erroneous to instruct the jury that "control" is required when the Supreme Court has written that "lower rung participants" acting at the direction of others are conducting the affairs of an enterprise.

Nothing in the *Reves* opinion suggests that "control" is an element of the test. In fact, the Court in a footnote wrote that "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires "*significant control* over or within an enterprise." *Reves*, 507 U.S. at 179 n.4. The Court gave one example in which an outsider might conduct an enterprise's affairs by exerting control through bribery. *Id.* at 184. It is clear that the

1 Court did not mean “legal control,” as a bribe does not give the briber legal control over the bribed.
 2 Instead, a bribe gives the briber influence and power. The Court also explained that RICO can be
 3 violated by “lower rung participants,” who by definition lack legal control over the enterprise. *Id.*

4 This proposed language is particularly confusing here due to the opinions of one of Altria’s
 5 experts, Professor Rock. If permitted, he will testify that Altria did not have legal control over JLI
 6 because it owned “only” 35% of the company. But as the *Reves* opinion makes clear, a party does
 7 not have to own a controlling interest in a company to conduct or participate in an enterprise. No
 8 one entity or individual owned more than 50% of JLI, so the argument that Altria hopes to present
 9 to the jury would suggest that no one conducted the affairs of the JLI enterprise.

10 *Second*, Altria’s proposed instruction requires that “Altria conducted or participated in
 11 conducting JLI’s affairs rather than conducting Altria’s own affairs.” While that may be a relevant
 12 distinction in a case involving an association-in-fact enterprise, SFUSD’s RICO claim is based on
 13 Altria’s operation of JLI, so there is no material distinction in this case. Further, when *Reves* used
 14 this phrase, it was referring to “complete outsiders,” not to a company such as Altria that owns 35%
 15 of the alleged enterprise, which is JLI. *See Reves*, 507 U.S. at 185 (“Third, § 1962(c) cannot be
 16 interpreted to reach complete ‘outsiders’ because liability depends on showing that the defendants
 17 conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs.”).
 18 Altria is not a “complete outsider,” so the relevant question is whether it conducted the affairs of
 19 JLI, not whether it was also conducting its own affairs. Altria cites the statement in *Reves* that
 20 “liability depends on showing that the defendants conducted or participated in the conduct of the
 21 ‘enterprise’s affairs,’ not just their own affairs.” *Id.* at 184. The word “just” is crucial here. Altria’s
 22 proposed instruction reads as if Altria cannot be liable if it is conducting its own affairs, but the law
 23 only disclaims liability if Altria is *solely* conducting its own affairs. To the extent that Altria is
 24 conducting its own affairs *and* JLI’s affairs, it may be held liable.

25 Altria cites to *Cedric Kushner*, but that case only supports SFUSD’s position. Altria’s
 26 proposed instruction reads as if conducting Altria’s affairs and JLI’s affairs are mutually exclusive
 27 concepts. But in *Cedric Kushner*, the Supreme Court required only a *legal* distinction between Don
 28 King the individual and Don King Productions, the corporation. *Cedric Kushner Promotions, Ltd.*

1 *v. King*, 533 U.S. 158, 163 (2001) (stating that we can find nothing in the statute that requires more
 2 ‘separateness’ than that”). The Court did not require that the *acts* of King as an individual and as a
 3 corporation be separate. *See id.* at 164-65 (stating that RICO protects the public from individuals
 4 who use a corporation as a vehicle for unlawful action). Giving the proposed instruction could
 5 confuse the jury into thinking that acts done for Altria’s own benefit could not also be part of the
 6 RICO enterprise, but nothing in the law supports that position.

7 None of Altria’s other cases meaningfully support giving its proposed instruction. Altria
 8 cites one unpublished case from this District that analyzed the issue of “control” in the RICO
 9 context. *See High v. Choice Mfg. Co.*, No. 11-5478, 2012 WL 3025922, at *8 (N.D. Cal. July 24,
 10 2012). But Altria cites nothing from the Supreme Court or the Ninth Circuit supporting this
 11 proposition, and as noted, the language of *Reves* contradicts this interpretation of the “conduct”
 12 element, as this Court has recognized. *See In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod.*
 13 *Liab. Litig.*, 497 F. Supp. 3d 552, 594 (N.D. Cal. 2020) (“This requirement does not
 14 limit RICO liability “to those with primary responsibility for the enterprise's affairs,” nor does it
 15 require a participant to exercise “significant control over or within an enterprise.”) (citing *Reves*,
 16 507 U.S. at 179 & n.4).

17 Many of Altria’s other cases stand for the unremarkable proposition that a corporation acts
 18 through its officers. Frankly, it is unclear how Altria believes this principle supports its instruction.
 19 The caselaw clearly indicates that this fact is no barrier to RICO liability. *See, e.g., Sever v. Alaska*
 20 *Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (“This decision makes it clear that the inability of
 21 a corporation to operate except through its officers is not an impediment to section 1962(c) suits.”);
 22 *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267 (3d Cir. 1995) (affirming RICO
 23 conviction over argument that defendants were not sufficiently distinct from corporation that
 24 committed fraud). Other cited cases do not even involve RICO. *See, e.g., Potter v. Hughes*, 546
 25 F.3d 1051, 1058 (9th Cir. 2008); *Schlafly v. United States*, 4 F.2d 195, 200 (8th Cir. 1925).

1 **[Contested, Altria-Proposed] RICO Section 1962(c) -- Corporate Governance**

2 **ALTRIA’S PROPOSAL:**

3 The alleged enterprise in this case, JLI, is a corporation that was organized and incorporated
4 under Delaware law. Corporations are typically controlled by corporate officers and a board of
5 directors. Altria is a separate corporation from JLI.

6 **ALTRIA’S POSITION:**

7 This instruction is supported by decisions that recognize “the principle that a corporation
8 acts only through its directors, officers, and agents.” *Cedric Kushner*, 533 U.S. at 165-66 (2001);
9 *see also, e.g., Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008) (“[T]he general rule of
10 American law is that the board of directors controls a corporation.”); *Sever v. Alaska Pulp Corp.*,
11 978 F.2d 1529, 1534 (9th Cir. 1992) (describing “inability of a corporation to operate except
12 through its officers”); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267 (3d Cir.
13 1995) (“Implicit in the Court’s analysis [in *Reves*] was the recognition that ‘inside’ managers are
14 the ‘persons’ §1962(c) was designed to reach.”); *Schlafly v. United States*, 4 F.2d 195, 200 (8th Cir.
15 1925) (“[T]he control of one corporation over another is ordinarily had by reason of control of the
16 voting stock therein, and not through control of the non-voting stock.”); *Zoumboulakis ex rel.*
17 *VeriFone Sys., Inc. v. McGinn*, 2014 WL 3926565, at *5 (N.D. Cal. 2014) (“[D]irectors of a
18 corporation and not its shareholders manage the business and affairs of the corporation”);
19 *Schoon v. Smith*, 953 A.2d 196, 206 (Del. 2008) (recognizing “bedrock statutory principle” of
20 Delaware law that the “business and affairs of every corporation . . . shall be managed by or under
21 the direction of a board of directors”) (citing Del. Gen. Corp. L. § 141(a)). This instruction is also
22 necessary to explain the applicable standard, focus the jury’s attention on the correct issues, and
23 prevent confusion and potential prejudice to Altria, since Altria is a separate corporate entity from
24 JLI. Plaintiff’s claim that this instruction “introduces irrelevant facts – such as how corporations
25 are ‘typically controlled’” is incorrect. Plaintiff’s theory of RICO enterprise alleges that a
26 corporation, JLI, was conducted as a RICO enterprise and not as a corporation. To evaluate this
27 theory, it is critical that the jury be instructed about corporations and how they are governed and
28 controlled.

PLAINTIFF’S POSITION:

This proposed instruction introduces irrelevant facts—such as how corporations are “typically controlled.” It also inaccurately says that the test the jury applies is “who controlled JLI.” As explained in connection with the preceding instruction, the use of this word is misleading and inconsistent with *Reves*.

1 **[Contested, Altria-Proposed] RICO Section 1962(c) – Providing Services to JLI Insufficient**
 2 **ALTRIA’S PROPOSAL:**

3 Evidence that Altria provided services to JLI does not establish that Altria conducted or
 4 participated in conducting the affairs of the alleged JLI enterprise.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is consistent with and supported by ample case law. *See, e.g.,*
 7 *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 728 (7th Cir. 1998) (“[S]imply performing services
 8 for an enterprise, even with knowledge of the enterprise’s illicit nature, is not enough to subject an
 9 individual to RICO liability under § 1962(c); instead, the individual must have participated in the
 10 operation and management of the enterprise itself.”); *Univ. of Md. at Baltimore v. Peat, Marwick,*
 11 *Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993) (stating that “[s]imply because one provides goods
 12 or services that ultimately benefit the enterprise does not mean that one becomes liable under
 13 RICO”); *Gardner v. Starkist Co.*, 418 F. Supp. 3d 443, 461 (N.D. Cal. 2019) (“Simply
 14 characterizing routine commercial dealing as a RICO enterprise is not enough.”); *Eclectic Props.*
 15 *E., LLC v. Marcus & Millichap Co.*, 2012 WL 713289, at *7 (N.D. Cal. 2012) (alleged marketing
 16 and misrepresentations “insufficient to show direction of the enterprise”), *aff’d*, 751 F.3d 990 (9th
 17 Cir. 2014); *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 307-08 (S.D.N.Y. 2010) (stating
 18 that “it is not enough to allege that a defendant provided services that were helpful to an enterprise,
 19 without alleging facts that, if proved, would demonstrate some degree of control over the
 20 enterprise”); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 347 (S.D.N.Y. 1998) (“While [t]here [was]
 21 no doubt that plaintiffs have alleged wrongful acts that were allegedly of real importance to
 22 Schick’s scheme,” which included “helping Schick to conceal the scheme generally[,] . . . when
 23 reduced to their essentials, these are really allegations of assistance to the alleged RICO enterprise,
 24 not direction of it.”); *In Re Taxable Municipal Bond Securities Litigation*, 1993 WL 534035 (E.D.
 25 La. 1993) (“Performance of legal services that facilitate operation of an enterprise does not
 26 represent participation in the ‘operation or management’ of the enterprise. This is so even when
 27 the defendant has substantial persuasive power to induce certain action by the enterprise, or, as part
 28 of its professional services offers consultation on important management decisions.”).

1 The proposed instruction is essential to make clear to the jury the kinds of activity that do
 2 and do not qualify as “conducting or participating in the conduct” of an alleged enterprise. This
 3 requirement for section 1962(c) claims is complex and so is the factual record on this issue. To
 4 avoid potential confusion and prejudice, the jury should be informed that providing services is
 5 insufficient to meet the requirement. For example, Plaintiff claims that Altria provided services to
 6 JLI and intends to offer evidence of those services. The proposed instruction would ensure that the
 7 jury does not mistakenly conclude that those services are sufficient to establish that Altria
 8 conducted or participated in conducting an enterprise or to find RICO liability.

9 Plaintiff’s objections that this is a factual argument that is insufficient for jury instructions
 10 and misleading are incorrect. It does not make a factual argument. The instruction sets forth a
 11 legal standard that has been set out many times over, as set forth above. And, rather than being
 12 misleading, the proposed instruction is necessary to avoid juror confusion given Plaintiff’s likely
 13 evidence. Plaintiff’s authorities do not support their argument. *Reves* did not hold that services
 14 were sufficient to show a defendant conducted or participated in conducting an enterprise. To the
 15 contrary, it held that defendant had not conducted the alleged enterprise notwithstanding claims
 16 that defendant had provided services. And Plaintiff acknowledges that, in *Tribune Co.*, the court
 17 found that liability would exist only if the defendant’s “interaction with the enterprise goes beyond
 18 merely providing services.”

19 **PLAINTIFF’S POSITION:**

20 Altria’s proposed language is a factual argument that is inappropriate for a jury instruction.
 21 It is also misleading because providing services to JLI is a relevant consideration for whether Altria
 22 directed, operated, or managed JLI within the meaning of the RICO statute, especially if providing
 23 services was one in a series of coordinated actions that advanced the enterprise. *See Reves v. Ernst*
 24 *& Young*, 507 U.S. 170, 184 (1993) (an enterprise can be operated or managed by those not in
 25 management if they exert control over the enterprise); *Tribune Co. v. Purcigliotti*, 869 F. Supp.
 26 1076, 1098 (S.D.N.Y. 1994), *aff’d* on other grounds, 66 F.3d 12 (2d Cir. 1995) (defendant who
 27 provides services can be held liable when interaction with the enterprise goes beyond merely
 28 providing services).

1 Contrary to Altria's assertions, this instruction would create confusion, not protect against
2 it. The case law cited is very different from the present situation. For instance, in *Goren v. New*
3 *Vision Int'l, Inc.*, 156 F.3d 721 (7th Cir. 1998), the key point was that there was no evidence that
4 certain defendants had performed services for the corporation. *Id.* at 728. Here, Plaintiff alleges not
5 only that Altria performed services for JLI, but that it purchased a large percentage of the company
6 and gained a measure of operational control. The suggestion that Altria should be immunized from
7 the consequences of participating in a fraudulent scheme simply because it was "performing
8 services" is contrary to law and would confuse the jury.

**Contested, Altria-Proposed] RICO Section 1962(c) – Knowledge About JLI Insufficient
ALTRIA’S PROPOSAL:**

Evidence that Altria had information about JLI or JUUL products does not establish that Altria conducted or participated in conducting the affairs of the alleged JLI enterprise.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with and supported by ample case law. *See, e.g., Walter v. Drayson*, 538 F.3d 1244, 1247, 1249 (9th Cir. 2008) (“It is not enough that [a defendant] failed to stop illegal activity,” and “simply being involved” or “performing services for the enterprise does not rise to the level of direction.”); *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 728 (7th Cir. 1998) (“[S]imply performing services for an enterprise, even with knowledge of the enterprise’s illicit nature, is not enough to subject an individual to RICO liability under § 1962(c); instead, the individual must have participated in the operation and management of the enterprise itself.”); *Hilton v. Apple Inc.*, No. CV137674GAFAJWX, 2014 WL 12597143, at *6 (C.D. Cal. Jan. 9, 2014) (acts undertaken without knowledge do not constitute a RICO enterprise.).

The proposed instruction is essential to make clear to the jury the kinds of activity that do and do not qualify as “conducting or participating in the conduct” of an alleged enterprise. This requirement for section 1962(c) claims is complex and so too is the factual record on this issue. To avoid potential confusion and prejudice, the jury should be informed that mere knowledge of wrongdoing is insufficient to meet the requirement. Plaintiff claims that Altria had such knowledge and intends to offer evidence purportedly showing such knowledge. The proposed instruction would ensure that the jury does not mistakenly conclude that this knowledge alone is sufficient to establish that Altria conducted or participated in conducting an enterprise or to find RICO liability.

Plaintiff’s objection that this is a factual argument that is insufficient for jury instructions is incorrect. It does not make a factual argument. Plaintiff also does not explain why this instruction is “unhelpfully vague” either. It sets forth a well-established legal standard that courts have applied many times over, as set forth above. Neither of the cases that Plaintiff cites even addresses that issue, nor does Plaintiff make any effort to distinguish the cases cited by Altria.

1 **PLAINTIFF’S POSITION:**

2 Altria’s proposed language is a factual argument that is inappropriate for a jury instruction.
3 It is also misleading because knowledge about JLI’s fraud is a relevant consideration for whether
4 Altria directed, operated, or managed JLI, especially in connection to other evidence. *In re JUUL*
5 *Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 604 (N.D. Cal. 2020)
6 (Courts “have held that *Reves* is satisfied by evidence that lower-rung members of an enterprise
7 implemented decisions directed by those higher up the ladder in the enterprise or committed
8 racketeering acts which furthered the basic goals of the enterprise at the direction of other members
9 of the enterprise.”) (quoting *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 580, 876
10 (D.D.C. 2006)).

11 This Court should reject Altria’s effort to issue a pile of instructions about what it does not
12 mean to conduct the affairs of an enterprise, thereby creating the impression of an impossibly high
13 bar. The caselaw cited does not support such an approach—nor does it address the specific issue
14 raised. None of the Altria’s parentheticals even claim that the cited cases address the question of
15 whether knowledge of a product’s nature and appeal is relevant to the question of whether a
16 defendant conducted the affairs of an enterprise

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1 **[Contested, Altria-Proposed] RICO Section 1962(c) – Influence Over JLI Insufficient**
 2 **ALTRIA’S PROPOSAL:**

3 Evidence that Altria had influence over JLI does not establish that Altria conducted or
 4 participated in conducting the affairs of the alleged JLI enterprise.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is consistent with and supported by ample case law. *See, e.g.,*
 7 *Strong & Fisher Ltd. v. Maxima Leather, Inc.*, No. 91 CIV. 1779 (JSM), 1993 WL 277205, at *1
 8 (S.D.N.Y. July 22, 1993) (“The fact that, as a major creditor of those corporations, these defendants
 9 had substantial persuasive power to induce management to take certain actions and had the legal
 10 authority to take other actions that could affect these corporations is not equivalent to having the
 11 power to ‘conduct or participate directly or indirectly in the conduct in the affairs of those
 12 corporations.’”); *In re MasterCard Int’l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 489
 13 (E.D. La. 2001) (“RICO liability does not always arise even when the defendant has influence in
 14 the enterprise.”), *aff’d sub nom. In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002).

15 The proposed instruction is essential to make clear to the jury the kinds of activity that do
 16 and do not qualify as “conducting or participating in the conduct” of an alleged enterprise. This
 17 requirement for section 1962(c) claims is complex and so too is the factual record on this issue. To
 18 avoid potential confusion and prejudice, the jury should be informed that having influence over an
 19 enterprise is insufficient to meet the requirement. Plaintiff claims that Altria had such influence
 20 and might argue that point to the jury. The proposed instruction would ensure that the jury does
 21 not mistakenly conclude that this influence alone is sufficient to establish that Altria conducted or
 22 participated in conducting an enterprise or to find RICO liability.

23 Plaintiff’s objection that this is a factual argument that is insufficient for jury instructions is
 24 incorrect. It does not make a factual argument. The instruction sets forth a legal standard that has
 25 been set out many times over, as set forth above. Nor is it “legally incorrect” as Plaintiff claims.
 26 The only support offered by Plaintiff for that point argues that influence is sufficient if it is “akin
 27 to bribery.” Plaintiff attacks a strawman. The proposed instruction does not say bribery would
 28 not be sufficient or address bribery at all.

1 **PLAINTIFF’S POSITION:**

2 Altria’s proposed language is legally incorrect. Influence can be sufficient to establish
3 Altria’s direction, operation, or control of JLI if, for example, it is akin to bribery. *Walter v.*
4 *Drayson*, 538 F.3d 1244, 1248 (9th Cir. 2008) (finding no operation or management because there
5 was “no inference that [the defendant] tried to control the enterprise by anything akin, for example,
6 to bribery”). As above, Altria’s proposed language is a factual argument and is inappropriate for a
7 jury instruction. The proposed instruction is also misleading because influence over JLI is a relevant
8 consideration for whether Altria directed, operated, or managed JLI within the meaning of the
9 RICO statute. *See id.*

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**[Contested, Altria-Proposed] RICO Section 1962(c) –
Desiring to Obtain Control Insufficient**

ALTRIA’S PROPOSAL:

Evidence that Altria wanted to exercise control over JLI does not establish that Altria conducted or participated in conducting the affairs of the alleged JLI enterprise without evidence proving that Altria actually exercised such control.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with and supported by ample case law. RICO requires control and not merely a desire for control. *See, e.g., High v. Choice Mfg. Co.*, No. C-11-5478 EMC, 2012 WL 3025922, at *8 (N.D. Cal. July 24, 2012) (noting courts have emphasized that “direction requires some degree of control” and collecting cases); *see also Dahlgren v. First Nat’l Bank*, 533 F.3d 681, 689-90 (8th Cir. 2008) (noting that 1962(c) requires that the defendant “exercise [] some degree of control over the operation or management of [the enterprise’s affairs]”).

The proposed instruction is essential to make clear to the jury the kinds of activity that do and do not qualify as “conducting or participating in the conduct” of an alleged enterprise. This requirement for section 1962(c) claims is complex and so is the factual record on this issue. To avoid potential confusion and prejudice, the jury should be informed that a mere desire for control is insufficient to meet the requirement. For example, Plaintiff claims that, at certain points during the negotiation period with JLI, Altria wanted to obtain a controlling interest in JLI. The proposed instruction would ensure that the jury does not mistakenly conclude that Altria wanting to obtain control is sufficient to establish that Altria conducted or participated in conducting an enterprise or to find RICO liability.

Plaintiff’s objection that this is a factual argument that is insufficient for jury instructions is incorrect. It does not make a factual argument. It also is not “misleading.” The instruction sets forth a legal limitation on RICO liability consistent with the case law here. And, rather than being misleading, the proposed instruction is necessary to avoid juror confusion given Plaintiff’s likely evidence.

PLAINTIFF'S POSITION:

Altria's proposed language is a factual argument that is inappropriate for a jury instruction. It is also misleading because desiring to obtain control over JLI, especially when connected to evidence that a defendant acted on that desire, is a relevant consideration for whether Altria directed, operated, or managed JLI within the meaning of the RICO statute. *See Walter v. Drayson*, 538 F.3d 1244, 1248 (9th Cir. 2008).

**[Contested, Altria-Proposed] RICO Section 1962(c) –
Employing Former Officers or Employees Insufficient**

ALTRIA’S PROPOSAL:

Individuals routinely move from one company to another company. The mere fact that certain Altria employees took positions and began working at JLI after they left Altria does not show that Altria conducted or participated in conducting the alleged JLI enterprise.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with and supported by principles of corporate law. Indeed, the Supreme Court has recognized that *overlapping* directors and officers is “entirely appropriate” and does not give rise to liability. *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (citation omitted); *see also, e.g., JJCO, Inc. v. Isuzu Motors Am., Inc.*, 2009 WL 3245556, at *9 (D. Haw. 2009) (similar). It is likewise supported by RICO decisions specifically. *See, e.g., Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 44 (D. Mass. 2018) (“The mere fact that officers of Healthy Pharms also occupy a role in Red Line and Tomolly does not sufficiently show that these entities joined the [RICO] conspiracy and furthered its criminal endeavors.”).

The proposed instruction is essential to make clear to the jury the kinds of activity that do and do not qualify as “conducting or participating in the conduct” of an alleged enterprise. This requirement for section 1962(c) claims is complex and so too is the factual record on this issue. To avoid potential confusion and prejudice, the jury should be informed that the mere fact that a person moves from one company to another is insufficient to meet the requirement. For example, Plaintiff claims that certain Altria employees left the company and thereafter began working at JLI. The proposed instruction would ensure that the jury does not erroneously conclude that these individuals changing companies establishes that Altria conducted or participated in conducting an enterprise or is sufficient to find RICO liability.

Plaintiff’s objection that this is a factual argument that is insufficient for jury instructions is incorrect. It does not make a factual argument. The instruction sets forth a legal standard that has been set out many times over, as set forth above. It also is not “misleading,” as Plaintiff claims.

1 To the contrary, the proposed instruction is necessary to avoid juror confusion given Plaintiff's
2 likely evidence.

3 **PLAINTIFF'S POSITION:**

4 Altria proposed language is a factual argument that is inappropriate for a jury instruction.
5 As above, the instruction is also misleading because JLI employing former officers and employees
6 of a defendant, especially when connected to other evidence is a relevant consideration for whether
7 Altria directed, operated, or managed JLI within the meaning of the RICO statute. *See Walter*, 538
8 F.3d at 1248.

9 Plaintiff does not argue that Altria is liable solely because it placed one of its officers into
10 the position of JLI's CEO. Rather, Altria's ability to make that move is evidence as to the level of
11 control that it exercised over JLI, which is an important factor under the *Reves* test, as described
12 above.

1 **[Contested, Altria-Proposed] RICO Section 1962(c) – Failure to Stop Illegal Activity**

2 **ALTRIA’S PROPOSAL:**

3 The fact that Altria knew about illegal activity but failed to stop that activity does not
4 without more establish that Altria conducted or participated in conducting the alleged JLI
5 enterprise.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction is consistent with and supported by ample case law. *See, e.g.,*
8 *Walter v. Drayson*, 538 F.3d 1244, 1247, 1249 (9th Cir. 2008) (“It is not enough that [a defendant]
9 failed to stop illegal activity,” and “simply being involved” or “performing services for the
10 enterprise does not rise to the level of direction.”); *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721,
11 728 (7th Cir. 1998) (“[S]imply performing services for an enterprise, even with knowledge of the
12 enterprise’s illicit nature, is not enough to subject an individual to RICO liability under § 1962(c);
13 instead, the individual must have participated in the operation and management of the enterprise
14 itself.”).

15 The proposed instruction is also essential to make clear to the jury the kinds of activity that
16 do and do not qualify as “conducting or participating in the conduct” of an alleged enterprise. This
17 requirement for section 1962(c) claims is complex and so too is the factual record on this issue. To
18 avoid potential confusion and prejudice, the jury should be informed that failure to stop illegal
19 activity is insufficient to meet the requirement. Plaintiff is likely to argue and/or offer evidence
20 purporting to show that Altria failed in this regard. The proposed instruction would ensure that the
21 jury does not mistakenly conclude that failure to stop illegal activity alone is sufficient to establish
22 that Altria conducted or participated in conducting an enterprise or to find RICO liability.

23 Plaintiff’s objection that this is a factual argument that is insufficient for jury instructions is
24 incorrect. It does not make a factual argument. The instruction sets forth a legal standard that has
25 been set out many times over, as set forth above. It also is not “misleading,” as Plaintiff claims.
26 To the contrary, the proposed instruction is necessary to avoid juror confusion given Plaintiff’s
27 likely evidence.

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1 **PLAINTIFF’S POSITION:**

2 Altria’s proposed language is a factual argument that is inappropriate for a jury instruction.
3 As above, the instruction is also misleading because the failure to stop JLI’s illegal activity,
4 especially when connected to other evidence, is a relevant consideration for whether Altria directed,
5 operated, or managed JLI within the meaning of the RICO statute. *See Walter*, 538 F.3d at 1248.
6 The instruction is also misleading, in that Plaintiff is not trying to hold Altria liable for failing to
7 stop JLI’s actions. It is attempting to hold Altria liable for actively participating in the management
8 of JLI, thereby engaging in a fraudulent scheme with the directors of the company.

**[Contested, Altria-Proposed] RICO Section 1962(c) –
“Through” a Pattern of Racketeering Activity**

ALTRIA’S PROPOSAL:

The next element requires the Plaintiff to show that Altria participated in conducting JLI’s affairs “through” a pattern of racketeering activity. “Through” means by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of.

RICO is not aimed at the legitimate business activities of corporations. Thus, it is not enough for Plaintiff to prove Altria merely conducted, or participated in conducting, JLI’s legitimate business affairs. Rather, Plaintiff must prove that Altria used JLI to conduct illegitimate activity, specifically, the alleged pattern of racketeering activity.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001) (“RICO both protects a legitimate enterprise from those who would use unlawful acts to victimize it . . . and also protects the public from those who would unlawfully use an enterprise (whether legitimate or illegitimate) as a vehicle through which unlawful . . . activity is committed.”); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 269 (3d Cir. 1995) (“[W]hen officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under § 1962(c).”); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1357 (11th Cir. 2016) (“[A] corporate defendant acting through its officers, agents, and employees is simply a corporation. Labeling it as an enterprise as well would only amount to referring to the corporate ‘person’ by a different name.”) (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001)). It is also consistent with this Court’s prior ruling that Plaintiff must prove “the existence of a distinct Enterprise, separate and apart from the general business of JLI.” *In re JUUL Labs, Inc., Mktg., Sales Practices, and Prods. Liab. Litig.*, 533 F. Supp. 3d 858, 869 (N.D. Cal. 2021). This instruction is needed for this reason also.

Altria’s proposed instruction is also necessary to explain the applicable standard, focus the jury’s attention on the correct issues, and prevent confusion and potential prejudice to Altria.

1 Plaintiff's theory of liability in this case takes an unprecedented approach by alleging that the RICO
2 enterprise was a corporation and Altria conducted that enterprise.

3 Plaintiff complains that this instruction defines "through." But this definition is legally
4 correct and gives the jury needed guidance when evaluating this requirement under RICO. Plaintiff
5 also references the instructions in *Planned Parenthood*. The claims, issues, allegations, and
6 evidence in *Planned Parenthood* were different from those in this case. *See supra*. Accordingly,
7 rather than simply adopting the instruction in *Planned Parenthood*, the Court should consider
8 whether, given the claims and evidence in this case, the instruction proposed by Altria would better
9 explain the issues to the jury and prevent confusion and prejudice. On this issue, the proposed
10 instruction would do so. The alleged enterprise here is JLI, which necessitates additional
11 instructions concerning RICO liability under these circumstances. Altria's proposed instruction
12 also elucidates the connection that Plaintiff must establish between the alleged enterprise and the
13 racketeering activity.

14 Plaintiff objects based on *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161
15 (2001). But that case addressed RICO's requirement that the enterprise be distinct from the person
16 who conducted the affairs of the enterprise. 533 U.S. at 161-62. That is not the question here and
17 does not inform whether this instruction is appropriate.

18 **PLAINTIFF'S POSITION:**

19 This proposed instruction is both unnecessary and legally incorrect. It is unnecessary to
20 define the word "through," as the elements of a RICO claim are all sufficiently defined through the
21 proposed instructions. Even more problematic is Altria's effort to use this "definition" section to
22 again push the legally inaccurate assertion that a RICO claim could not be based on JLI's
23 "legitimate business affairs." This phrase raises the unanswered question of, what does it mean to
24 be "legitimate"? Conducting a corporation's regular affairs can support a RICO claim. *Cedric*
25 *Kushner*, 533 U.S. at 161-63.

RICO – Pattern of Racketeering⁴²

A pattern of racketeering activity requires:

First, at least two separate acts of racketeering were committed, though two separate racketeering acts are not necessarily enough to establish a pattern of racketeering;

Second, the acts of racketeering had a relationship to each other which posed a threat of continued criminal activity; and

Third, the acts of racketeering embraced the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics.

Sporadic, widely separated, or isolated criminal acts do not form a pattern of racketeering activity.

⁴² *Planned Parenthood Fed. of Am., Inc.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 62

RICO – “Racketeering Act” Defined⁴³

In this case, Plaintiff alleges that Altria engaged in racketeering activity by violating the federal mail and wire fraud statutes.

As I mentioned in the previous instruction, a pattern of racketeering requires at least two acts of racketeering. The two contemplated racketeering acts may be of the same type, for example, two acts of wire fraud; or, the two acts may be of different predicates, for example, one act of wire fraud and one act of mail fraud. Regardless of whether it is two racketeering acts of the same type or two racketeering acts of two different types, in order to satisfy this element, you cannot find that Altria engaged in a “pattern of racketeering activity” unless you unanimously agree on which of the alleged predicate acts, if any, make up the pattern.

I will now instruct you on the definition of each of these racketeering activities that Altria is alleged to have committed.

⁴³ *Planned Parenthood Fed. of Am., Inc.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 63

RICO – Predicate Acts Must Be Related⁴⁴

To prove a pattern of predicate acts, Plaintiff must show that the predicate acts were related to one another and to the enterprise. Two or more acts of racketeering activity that are not related do not establish a pattern of racketeering activity under RICO. Predicate acts are “related” to one another if they have the same or similar purposes, results, participants, victims, or methods. Predicate acts are also related if they have common distinguishing characteristics and are not isolated events.

⁴⁴ Eleventh Cir. Model Civil Instr. 7.3 (modified)

1 **[Contested, Competing Proposals] RICO – Predicate Acts Must Demonstrate Continuity**

2 **PLAINTIFF’S PROPOSAL:**

3 To make up a pattern of racketeering activity, predicate acts must demonstrate continuity.
 4 Continuity can be demonstrated in two basic ways. The first way is to demonstrate related predicate
 5 acts extending over a substantial period of time, that is, more than a few weeks or months. The
 6 second way is to show conduct that does not occur over a substantial period of time but, by its
 7 nature, is likely to be repeated into the future.

8 **ALTRIA’S PROPOSAL:**

9 To make up a pattern of racketeering activity, predicate acts must demonstrate continuity.
 10 Continuity can be demonstrated in two basic ways. The first way is to demonstrate related predicate
 11 acts extending over a substantial period of time. The second way is to show conduct that does not
 12 occur over a substantial period of time but, by its nature, is likely to be repeated into the future.

13 **PLAINTIFF’S POSITION:**

14 The only difference in the proposed instructions involves the clarifying phrase: “that is,
 15 more than a few weeks or months.” It will aid the jury to define what a “substantial period of time”
 16 means. Without some definition, the jury might be confused as to whether that means a few weeks,
 17 a few months, or a few years. The proposed instruction is neutral, in that it prevents the jury from
 18 finding continuity based on a period that is too short or finding that it doesn’t exist when the
 19 enterprise occurred over a sufficient time period. The instruction is supported by case law. *H.J. Inc.*
 20 *v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989) (“Predicate acts extending over a few weeks or
 21 months and threatening no future criminal conduct do not satisfy this requirement.”). Altria cites
 22 *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995), but that case expressly disclaimed “a hard
 23 and fast, bright line, one-year rule” as inconsistent with “the fluid concept of continuity enunciated
 24 by the Supreme Court in *H.J.*” *Id.* at 1528.

25 **ALTRIA’S POSITION:**

26 The parties’ respective proposals different in one respect. Plaintiff adds language that
 27 would instruct the jury that continuity requires a period of time that is “more than a few weeks or
 28 months.” Plaintiff’s suggestion that conduct exceeding “a few weeks or months” is sufficient to

1 meet the continuity requirement is legally incorrect. As the Ninth Circuit has observed, “courts
2 virtually always find that activity spanning less than one year does not satisfy the close-ended
3 continuity requirement.” *Allwaste v. Hecht, Inc.*, 65 F.3d 1523, 1528 (9th Cir. 1985); *see also, e.g.*,
4 *Malhotra v. Copa de Oro Realty, LLC*, 2015 WL 12656293, at *12–13 (C.D. Cal. Sept. 23, 2015)
5 (finding 10 months insufficient), *aff’d sub nom. Malhotra v. Copa de Ora Realty, LLC*, 673 F.
6 App’x 666 (9th Cir. 2016).

1 **[Contested, Altria-Proposed] Predicate Acts Must Be Those Alleged By Plaintiff**

2 **ALTRIA’S PROPOSAL:**

3 Again, “racketeering activity” means an act that violates the federal mail or wire fraud
 4 statutes. But you cannot consider just any racketeering act Altria allegedly committed in violation
 5 of one of these statutes as bearing on whether Altria has committed two or more predicate acts as
 6 a pattern of racketeering activity. To determine if there is a pattern of racketeering activity, you
 7 must consider only those specific racketeering acts Plaintiff alleges against Altria.

8 **ALTRIA’S POSITION:**

9 This instruction is consistent with the pattern instructions in the Eleventh Circuit and makes
 10 clear that the racketeering activity relevant to the jury’s determination is the specific acts alleged
 11 by Plaintiff. Eleventh Cir. Model Civil Instr. 7.3. The proposed instruction is needed to explain the
 12 applicable standard, focus the jury’s attention on the correct issues, and prevent confusion and
 13 potential prejudice to Altria. Plaintiff’s allegations and evidence span a wide range of conduct by
 14 Altria, much of which is outside the scope of the mail and wire fraud allegations upon which its
 15 RICO claim is based. Plaintiff’s case does not support their objection because the court was
 16 addressing *conspiracy* claims under 1962(d) when stating that plaintiff “need not prove that the
 17 defendant himself performed the predicate acts.” *United States v. Jaimez*, 45 F.4th 1118, 1130 (9th
 18 Cir. 2022).

19 **PLAINTIFF’S POSITION:**

20 Plaintiff objects to this instruction as confusing and unnecessary. The instruction is
 21 unnecessary because the jury will be instructed to consider the evidence before it. It is confusing
 22 because the jury will not know what the Plaintiff has alleged in its complaint. The jury should be
 23 permitted to reach conclusions from the evidence presented at trial.

**[Contested, Competing Proposals] RICO – Mail and Wire Fraud –
Violation of 18 U.S.C. § 1341 or 18 U.S.C. § 1343**

PLAINTIFF’S PROPOSAL:

The Plaintiffs allege that Altria committed violations of the federal mail and wire fraud statutes. To prove a violation of those statutes, Plaintiffs must prove all of the following:

First, Altria knowingly participated in, devised, or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. Deceitful statements or half-truths may constitute false or fraudulent representations.

Second, the statements made as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property.

Third, Altria acted with the intent to defraud; that is, the intent to deceive and cheat; and

Fourth, Altria used, or caused to be used, the mails or an interstate wire communication to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only Altria’s words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

A wiring is caused when one knows that a wire will be used in the ordinary course of business or when one can reasonably foresee such use. It need not have been reasonably foreseeable to the defendant that the wire communication would be interstate in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate wire communication must have actually occurred in furtherance of the scheme.

ALTRIA’S PROPOSAL:

The Plaintiffs allege that Altria committed violations of the federal mail and wire fraud

1 statutes. To prove that Altria violated those statutes, Plaintiffs must prove all of the following:

2 First, Altria knowingly participated in, devised, or intended to devise a scheme or plan to
3 defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent
4 pretenses, representations, or promises.

5 Second, the statements made as part of the scheme were material; that is, they had a natural
6 tendency to influence, or were capable of influencing, a person to part with money or property.

7 Third, someone believed the false or fraudulent pretenses, representations, or promises by
8 Altria, took action in reliance on that belief, and that action directly harmed Plaintiff's business or
9 property of Plaintiff;

10 Fourth, Altria acted with the intent to defraud; that is, the intent to deceive and cheat; and

11 Fifth, Altria used, or caused to be used, the mails or an interstate wire communication to
12 carry out or attempt to carry out an essential part of the scheme.

13 In determining whether a scheme to defraud exists, you may consider not only the
14 defendant's words and statements, but also the circumstances in which they are used as a whole.

15 A mailing is caused when one knows that the mails will be used in the ordinary course of
16 business or when one can reasonably foresee such use. It does not matter whether the material
17 mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does
18 it matter whether the scheme or plan was successful or that any money or property was obtained.

19 A wiring is caused when one knows that a wire will be used in the ordinary course of business or
20 when one can reasonably foresee such use. It need not have been reasonably foreseeable to the
21 defendant that the wire communication would be interstate in nature. Rather, it must have been
22 reasonably foreseeable to the defendant that some wire communication would occur in furtherance
23 of the scheme, and an interstate wire communication must have actually occurred in furtherance of
24 the scheme.

25 **PLAINTIFF'S POSITION:**

26 Plaintiff's proposed instruction reflect the Ninth Circuit Model Criminal Instructions 15.32
27 and 15.5. There are two problems with Altria's proposed instruction. *First*, Altria's instruction
28 improperly removes language indicating that "[d]eceptive statements or half-truths may constitute

1 false or fraudulent representations.” This statement is taken directly from both the mail and wire
 2 fraud pattern language. While the language is in brackets, it should be given as it accurately states
 3 the law. *See, e.g., United States v. Sumeru*, 449 F. App’x 617, 621–22 (9th Cir. 2011) (affirming
 4 wire fraud conviction because “a broker cannot tell a misleading half-truth about a material fact to
 5 a potential investor”).

6 *Second*, Altria’s proposal improperly injects a reliance requirement, which is inconsistent
 7 with Supreme Court authority. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008)
 8 (stating that “no showing of reliance is required to establish that a person has violated § 1962(c) by
 9 conducting the affairs of an enterprise”). As to “indirect” reliance, *Bridge* merely noted that under
 10 the fact patterns of many cases, reliance by someone would be needed to establish causation. *Id.* at
 11 658. The jury should decide what is necessary to establish causation in a given case. In *Painters &*
 12 *Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd.*, 943 F.3d 1243 (9th
 13 Cir. 2019), the court noted the similarity in the fact patterns of *Bridge*—an indirect reliance case—
 14 and that case, involving prescription drugs. *Id.* at 1259-60. But the Ninth Circuit did not state
 15 reliance as a rule—nor could it, given that the Supreme Court has disclaimed such a rule. Certainly,
 16 such a rule requiring reliance on a misrepresentation would be illogical in cases like this one that
 17 depend, at least in part, on fraud by omission.

18 **ALTRIA’S POSITION:**

19 Altria’s proposed instruction and Plaintiff’s proposed instruction differ in two respects.
 20 *First*, Plaintiff’s proposed instruction would include additional language stating that “[d]eceptful
 21 statements or half-truths may constitute false or fraudulent representations.” This language is
 22 included in brackets in the Ninth Circuit’s Model Criminal Instructions for mail and wire fraud.
 23 Ninth Cir. Model Crim. Instr. 15.32. Plaintiff, however, has failed to demonstrate why this
 24 bracketed language should be included in the instruction in this case.

25 *Second*, the paragraph that begins with “Third” in Altria’s proposal would add a paragraph
 26 explaining that Plaintiff must demonstrate reliance on a purported act of mail or wire fraud. This
 27 language is necessary to inform the jury that predicate acts of mail fraud includes a reliance
 28 requirement and are not established by false statements alone. *See, e.g., Poulos v. Caesars World*,

1 *Inc.*, 379 F.3d 654, 664-66 (9th Cir. 2004) (reliance “provides a key causal link” in RICO cases and
 2 “all plaintiffs asserting civil RICO claims[] must prove individualized reliance where that proof is
 3 otherwise necessary to establish actual or proximate causation”); *Painters & Allied Trades Dist.*
 4 *Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd.*, 943 F.3d 1243, 1260 (9th Cir. 2019)
 5 (RICO plaintiffs must show “someone in the chain of causation *relied* on Defendants’ alleged
 6 misrepresentations and omissions”).

7 Plaintiffs try to avoid reliance based on *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S.
 8 639, 642, 655-58 (2008). *Bridge* did not eliminate a reliance requirement from RICO mail and
 9 wire fraud claims. The Court held that *direct* reliance would not be required under the specific
 10 facts presented in *Bridge*, since plaintiffs had not seen or even received the defendant’s alleged
 11 misrepresentations. *Id.* at 659. But it made clear that it was *not* holding “that a RICO plaintiff who
 12 alleges injury ‘by reason of’ a pattern of mail fraud can prevail without showing that *someone* relied
 13 on the defendant’s misrepresentations.” *Id.* at 658-59 (emphasis in the original). The Ninth Circuit
 14 relied on *Bridge* expressly in *Painters* when holding that “someone in the chain of causation” must
 15 have “relied on Defendants’ alleged misrepresentations and omissions.” 943 F.3d at 1260. As the
 16 Ninth Circuit explained, “logically, a plaintiff cannot even establish but-for causation if *no one*
 17 relied on the defendant’s alleged misrepresentation.” *Id.*

18 These decisions confirm that reliance is required in RICO mail and wire fraud cases. They
 19 also show that reliance may be “indirect” in certain cases where there was no direct link between
 20 defendant and plaintiffs such that direct reliance is not possible. But there is nothing to suggest
 21 that reliance need not be proven by plaintiffs who were exposed to the alleged fraud and are capable
 22 of proving direct reliance. To the contrary, courts since *Bridge* continue to recognize that, “in
 23 [RICO] cases arising from fraud, a plaintiff’s ability to show a causal connection between
 24 defendants’ misrepresentation and his or her injury will be predicated on plaintiff’s alleged reliance
 25 on that misrepresentation.” *CGC Holding*, 773 F.3d at 1089; *see also, e.g., Allstate Ins. Co. v.*
 26 *Palterovich*, 653 F. Supp. 2d 1306, 1323 (S.D. Fla. 2009) (explaining that *Bridge*’s holding “is not
 27 an issue in this case, where Plaintiffs have alleged that their injuries flowed directly from their
 28 reliance on Defendants’ misrepresentations”). As Judge Breyer explained when requiring direct

1 reliance in *Badella v. Deniro Mktg. LLC*, “this case is unlike *Bridge* where third-party
2 representations caused damage to the plaintiff. This is a classic first-party reliance case.” 2011
3 WL 5358400, at *6 (N.D. Cal. Nov. 4, 2011) (citation omitted). The Court should therefore include
4 the language proposed by Altria.

1 **[Contested, Altria-Proposed] RICO Mail and Wire Fraud – Scheme to Defraud**

2 **ALTRIA’S PROPOSAL:**

3 A “scheme to defraud” means any plan or course of action intended to deceive or cheat
4 someone out of money or property using false or fraudulent pretenses, representations, or promises.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is consistent with RICO case law holding that claims on mail
7 and wire fraud require “a scheme or artifice devised with [] specific intent to defraud.” *Orr v. Bank*
8 *of Am., NT & SA*, 285 F.3d 764, 782 (9th Cir. 2002) (citation omitted). It is likewise consistent
9 with the Eleventh Circuit’s model instructions. Eleventh Cir. Model Crim. Instr. O50.1. Plaintiff
10 claims that this instruction is redundant and unnecessary given the proposed instructions describing
11 mail and wire fraud. This is incorrect. The parties’ proposed instructions setting out the elements
12 of mail and wire fraud states that Plaintiff must show that Altria “knowingly participated in,
13 devised, or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money
14 or property by means of false or fraudulent pretenses, representations, or promises.” But, unlike
15 Altria’s proposed instruction here, that instruction does not define or explain what a scheme to
16 defraud is. This additional explanation is necessary to provide the jury with the necessary guidance
17 to consider whether Plaintiff can establish predicate acts of mail and wire fraud.

18 **PLAINTIFF’S POSITION:**

19 This instruction is duplicative. The mail and wire fraud instruction gives the jury all of the
20 information that it needs to determine whether the alleged enterprise has engaged in a pattern of
21 mail or wire fraud. In particular, both Plaintiff’s and Altria’s proposed instructions on mail and
22 wire fraud tell the jury how to determine whether there is a “scheme to defraud.”

1 **[Contested, Altria-Proposed] RICO Mail and Wire Fraud – Specific Intent**

2 **ALTRIA’S PROPOSAL:**

3 To establish that Altria made a statement with the specific intent to defraud, Plaintiff must
 4 prove that Altria knew the statement was false when making it and intended to deceive the recipient
 5 of the statement into believing something that was not true to cause loss or injury. Moreover,
 6 proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove
 7 intent to defraud.

8 **ALTRIA’S POSITION:**

9 Altria’s proposed instruction is consistent with RICO case law holding that mail and wire
 10 fraud requires “specific intent to defraud.” *See, e.g., Orr v. Bank of Am., NT & SA*, 285 F.3d 764,
 11 782 (9th Cir. 2002) (mail and wire fraud requires “specific intent to defraud”). In addition, this
 12 language is based on the Eleventh Circuit’s model criminal instructions. Eleventh Cir. Model Crim.
 13 Instr. O50.1. This instruction is necessary and appropriate to ensure that the jury understands the
 14 requirement that Plaintiff prove that false statements were made with specific intent. Plaintiff
 15 claims that this instruction is unnecessary because it would be redundant of the instruction that sets
 16 out the requirements of mail and wire fraud. But that instruction does not explain what the “specific
 17 intent” requirement means or what Plaintiff must establish to prove specific intent and Altria’s
 18 proposed instruction is needed to avoid potential confusion.

19 **PLAINTIFF’S POSITION:**

20 Altria’s proposed instruction is redundant and confusing. Plaintiff’s proposed instruction on
 21 mail and wire fraud follows the Ninth Circuit pattern instructions and gives the jury all of the
 22 information it needs to determine whether the Defendants committed mail or wire fraud. *See Ninth*
 23 *Cir. Model Crim. Instr. 15.32, 15.35.* Altria’s instruction is also confusing, in that it suggests the
 24 only type of fraud is an affirmative misstatement, but as recognized by the pattern instructions,
 25 “[d]eceptive statements or half-truths may constitute false or fraudulent representations.” *Id.* While
 26 the case Altria cites references a “specific intent to defraud,” nothing in the rest of the instruction
 27 appears on the cited page. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 782 (9th Cir. 2002).
 28

1 **[Contested, Altria-Proposed] RICO Mail and Wire Fraud – Forward Looking Statements**

2 **ALTRIA’S PROPOSAL:**

3 A statement about what is expected to occur in the future is not knowingly or intentionally
4 false just because future events do not occur as projected or predicted.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction explains that forward-looking statements are not actionable as
7 fraud. That instruction is supported by relevant case law. *See, e.g., In re Restoration Robotics, Inc.*
8 *Sec. Litig.*, 417 F. Supp. 3d 1242, 1255 (N.D. Cal. 2019) (forward-looking statements and
9 statements of belief are expressions of corporate optimism, not misstatements or omissions); *In re*
10 *Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1255 (N.D. Cal. 2019) (forward-
11 looking statements and statements of belief are expressions of corporate optimism, not
12 misstatements or omissions). This instruction is appropriate here given the likelihood that Plaintiff
13 will offer evidence or argument concerning forward-looking statements made by Altria when
14 attempting to prove its RICO claims. In the absence of the proposed instruction, the jury would
15 not be aware of this limitation and might conclude that forward looking statements could serve as
16 the basis of a fraud claim if something projected as happening in the future did not take place, a
17 result that would be contrary to the law.

18 **PLAINTIFF’S POSITION:**

19 Plaintiff objects to this instruction as confusing, and as legally and factually unsupported.
20 In the case cited by Altria, the point of law laid out is: “In the Ninth Circuit, vague, generalized
21 assertions of corporate optimism or statements of ‘mere puffing’ are not actionable material
22 misrepresentations under federal securities laws because no reasonable investor would rely on such
23 statements.” *In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1255 (N.D. Cal.
24 2019) (quotations omitted). This case is not a securities case, but even if it were, there is no factual
25 basis because the alleged mail and wire fraud does not include “generalized statements of corporate
26 optimism” or “mere puffing.”

1 **[Contested, Altria-Proposed] RICO Mail and Wire Fraud – Good Faith**

2 **ALTRIA’S PROPOSAL:**

3 Good faith on the part of Altria is a complete defense to mail or wire fraud because good
4 faith is inconsistent with a finding that Altria had the specific intent to defraud.

5 A person who acts, or causes another person to act, on a belief or an opinion honestly held
6 is not liable under the mail or wire fraud statutes merely because the belief or opinion turns out to
7 be inaccurate, incorrect, or wrong. An honest mistake in judgment or an error in management
8 does not rise to the level of the conduct prohibited by the mail and wire fraud statutes. Those
9 statutes are aimed at people who act with the particular unlawful intent required for each alleged
10 mail or wire fraud violation.

11 In determining whether or not Plaintiff has proven that Altria acted with the specific intent
12 to commit the mail or wire fraud violation alleged or whether Altria acted in good faith, you must
13 consider all of the evidence received in the case bearing on Altria’s state of mind.

14 **ALTRIA’S POSITION:**

15 Altria’s proposed instruction is appropriate and necessary to ensure the jury understands
16 that actions taken in good faith are not actionable under RICO. The proposed instruction is
17 consistent with instructions that are routinely given in cases alleging fraud. *See, e.g., O’Malley,*
18 *Federal Jury Practice & Instructions: Criminal* § 19:06 (6th ed. Feb. 2021 update) (modified); *see*
19 *Sand, Modern Federal Jury Instructions* ¶ 8.01 (Good Faith) (Matthew Bender ed. 2020); *United*
20 *States v. Tarallo*, 380 F.3d 1174, 1191 (9th Cir. 2004) (endorsing good-faith instruction); *United*
21 *States v. Amlani*, 111 F.3d 705, 717-18 (9th Cir. 1997) (similar); *United States v. Gering*, 716 F.2d
22 615, 622 (9th Cir. 1983) (approving of instruction that “[i]f you find that a defendant in good faith
23 believes that the representations which were being made by himself were true, the necessary intent
24 did not exist and the defendant must be acquitted on all counts”); *United States v. Lin*, 3:11-cr-
25 00393-THE, Dkt. 102, Jury Instructions, at 42-44 (N.D. Cal. May 5, 2012) (instructing the jury on
26 good faith). Plaintiff argues that this instruction is unnecessary because the pattern instruction
27 setting out the elements of mail and wire fraud requires specific intent. The language in that
28 instruction is insufficient. It does not explain that actions taken in good faith cannot be liable for

1 mail or wire fraud even if the statement at issue turns out to be untrue. Accordingly, in the absence
2 of the proposed instruction here, this important limitation upon Altria's potential liability would go
3 unexplained, creating a significant risk of prejudice to Altria. Plaintiff's argument that "the Court
4 should be seeking to limit the number" of proposed instructions is meritless. The Court should
5 adequately instruct the jury on Plaintiff's claims, which in this case are complex, regardless of the
6 number of instructions that entails.

7 **PLAINTIFF'S POSITION:**

8 This instruction as duplicative and confusing. The pattern instructions on mail and wire
9 fraud clearly spell out that the jury must find that Altria knowingly participated in the scheme,
10 and "acted with the intent to defraud; that is, the intent to deceive and cheat." Ninth Cir. Model
11 Crim. Instr. 15.32, 15.35. Such findings are obviously inconsistent with "good faith" by Altria,
12 and the jury should not be misled into believing that there is some additional requirement that
13 does not exist. The fact that an instruction is sometimes given in common-law fraud cases does
14 not establish that it needs to be given in a case involving a statutory claim and a specific type of
15 fraud. *Cf. Bridge*, 553 U.S. at 652-53 (rejecting the argument that the elements of common-law
16 fraud should influence the Court's interpretation of the elements necessary to establish a RICO
17 claim).

[Contested, Plaintiff-Proposed] RICO – Mail and Wire Fraud – Vicarious Liability**PLAINTIFF’S PROPOSAL:**

If you decide that Altria was a member of a scheme to defraud and that Altria had the intent to defraud, Altria may be responsible for other co-schemers’ actions during the course of and in furtherance of the scheme, even if Altria did not know what the other co-schemers said or did.

For Altria to be liable for an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that Altria could reasonably foresee as a necessary and natural consequence of the scheme to defraud.

PLAINTIFF’S POSITION:

Plaintiff’s proposed instruction reflects Ninth Cir. Model Crim. Instr. 15.33, modified for the civil nature of case and for case specifics. Plaintiff’s instruction accurately states the law, as laid out by the Ninth Circuit pattern instruction. While Altria claims that the pattern instruction inaccurately states the law, it has not provided any case citations indicating that the instruction is incorrect. Nor has it explained how the language of Sections 1962(c) and (d) demonstrates that the pattern instruction is incorrect.

ALTRIA’S POSITION:

Altria objects to Plaintiff’s proposed instruction as contrary to the law, confusing, unnecessary, and prejudicial. Plaintiff’s proposed instruction does not define what a “member of a scheme to defraud” is. The instruction, however, suggests that it would be a member of some conspiracy rather than a party that conducted or participated in conducting an enterprise through a pattern of racketeering activity. In this respect, Plaintiff’s proposed instruction conflates the requirements of RICO claims brought under §§ 1962(c) and 1962(d) of RICO and would confuse and mislead the jury. Moreover, contrary to the Plaintiff’s proposed instruction, a defendant who might be liable under § 1962(c) does not assume liability for all actions taken by “other co-schemers’ actions during the course of and in furtherance of the scheme” as the Plaintiff’s proposed instruction states. Among other things, Altria is not liable for actions taken by other alleged schemers before or after Altria was conducting or participating in conducting the alleged enterprise. Plaintiff’s proposed instruction therefore does not accurately state the law. Plaintiff’s reliance upon

1 a model instruction as the basis for this proposal does not excuse these problems. As the Ninth
2 Circuit has explained, even “standard instructions may not always pass muster” *United States*
3 *v. Pena-Ozuna*, 511 F.2d 1106, 1108 (9th Cir. 1975). Finally, the proposed instruction is
4 unnecessary given that Altria’s proposed instructions are sufficient to explain the requirements of
5 Plaintiff’s § 1962(c) claim.

RICO – Racketeering Conspiracy – Conspiracy in General

I said that Plaintiff alleged two bases for its RICO claim. Plaintiff's second basis alleges a conspiracy to violate RICO. Plaintiff alleges that Altria knowingly and intentionally conspired with at least one other person to conduct or to participate in the conduct of the affairs of the enterprise in violation of RICO.

RICO Section 1962(d) – Violation of 1962(c) Required

Plaintiff's RICO conspiracy claim requires that Plaintiff first prove by a preponderance of the evidence that Altria or a person who conspired with Altria to conduct an enterprise violated RICO by being employed by or associated with an enterprise to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity. If Plaintiff fails to prove a violation of RICO, then you must find for Altria on the conspiracy-to-violate-RICO claim.

RICO – Racketeering Conspiracy – Elements

Plaintiff must prove each of the following elements of a conspiracy to violate RICO by a preponderance of the evidence:

First, the alleged enterprise was or would be established;

Second, Altria knowingly agreed that either Altria or another person would be associated with the enterprise; and

Third, Altria knowingly agreed that either Altria or another person would conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity. For purposes of conspiracy, it is not necessary for Plaintiff to prove that Altria actually committed a pattern of racketeering activity, but Plaintiff must prove that Altria agreed to participate in the conspiracy with the knowledge and intent that at least one member of the racketeering conspiracy would intentionally commit, or cause, or aid and abet the commission of, two or more racketeering acts.

In your consideration of Plaintiff's conspiracy claim, you should first determine whether the alleged conspiracy existed. If you conclude that a conspiracy existed as alleged, you should then determine whether Altria knowingly became a member of that conspiracy.

RICO—Racketeering Conspiracy—Agreement Required⁴⁵

In your consideration of Plaintiff's conspiracy claim, you should first determine whether the alleged conspiracy existed and included Altria. To find the existence of a conspiracy that included Altria, Plaintiff must prove that Altria agreed with another member of that conspiracy to accomplish an unlawful plan through a pattern of racketeering activity.

To establish the existence of an agreement, Plaintiff must demonstrate that Altria and another member of the conspiracy had a meeting of the minds and that they agreed to work together to accomplish an objective. Plaintiff must show that the conspirators objectively manifested, through words or actions, agreement to control or participate in the enterprise's affairs. If you find that Altria did not agree to join or that a conspiracy did not exist, then you must find for Altria on this claim.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. An informal understanding is enough. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another.

A conspiracy may continue for a long period of time and may include the performance of many transactions. One may join a conspiracy after it is already in progress. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

⁴⁵ *Planned Parenthood Fed. of Am., Inc.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 66; *Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir. 1993).

**[Contested, Altria-Proposed] RICO 18 U.S.C. § 1962(d) –
Similar Conduct Does Not Establish Conspiracy**

ALTRIA’S PROPOSAL:

Mere presence at the scene of some transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with RICO case law setting forth the requirements for a claim under section 1962(d), which requires significantly more than evidence that the alleged conspirators engaged in similar conduct or assembled together and associated with one another. *See, e.g., Just Film, Inc. v. Merch. Servs., Inc.*, No. 10-CV-01993, 2010 WL 4923146, at *15 (N.D. Cal. Nov. 29, 2010) (finding allegations of “benefits obtained” by the purported co-conspirators “through associating together” insufficient for a conspiracy); *Green v. Bissell Homecare Inc.*, No. 10-CV-02421, 2011 WL 13175163, at *12 (N.D. Ala. July 29, 2011) (finding allegations of “[no]thing more than the fact that Wal-Mart sold [allegedly misrepresented products]” “and the presumed retailer-manufacturer contract between Wal-Mart and each of the manufacturers with whom it does business” insufficient for a conspiracy). Plaintiffs “must show that defendants objectively manifested their agreement to participate in a racketeering enterprise through the commission of two or more predicate crimes.” *Avalos v. Baca*, 517 F. Supp. 2d 1156, 1170 (C.D. Cal. 2007). This requires proof that defendants “knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise,” *United States v. Fernandez*, 388 F.3d 1199, 1229-30 (9th Cir. 2004), and were “aware of the essential nature and scope of the enterprise and intended to participate in it,” *id.* (quoting *Howard*, 208 F.3d at 751). This instruction is also consistent with the Eleventh Circuit’s model jury instructions for RICO. Eleventh Cir. Model Civil Instr. 7.4.

Altria’s proposed instruction therefore correctly explains to the jury that similar conduct, being present at the scene of some act, or associating with an alleged co-conspirator is not enough

1 to establish a conspiracy. This clarification is critical here because Plaintiff is likely to offer
 2 evidence that might show that Altria shared a common aim or associated or assembled together
 3 with another person. Without this instruction, the jury might incorrectly conclude that those actions
 4 alone are enough to establish a conspiracy.

5 Plaintiff does not object to the instruction as inconsistent with the law. Instead, Plaintiff
 6 objects to Altria's proposal here and with respect to certain other instructions outlining the
 7 requirements for a claim under 18 U.S.C. § 1962(d) because the instructions depart from the RICO
 8 conspiracy instruction that the Court gave in the *Planned Parenthood* case. But the claims, issues,
 9 allegations, and evidence in *Planned Parenthood* were different from those in this case. *See supra*.
 10 Accordingly, rather than simply adopting the instruction in *Planned Parenthood*, the Court should
 11 consider whether, given the claims and evidence in this case, the instruction proposed by Altria
 12 would better explain the issues to the jury and prevent confusion and prejudice. Altria's proposed
 13 instructions on section 1962(d) would do so. These instructions explain the requirements for a
 14 conspiracy claim and what those requirements mean in a manner that is appropriate given the
 15 Plaintiff's allegation that JLI is the purported RICO enterprise and certain officers and directors of
 16 JLI and an investor in JLI conspired to conduct JLI as enterprise through a pattern of racketeering
 17 activity.

18 **PLAINTIFF'S POSITION:**

19 Plaintiff objects to this instruction because the substance of it is captured by the RICO
 20 Conspiracy Elements instruction proposed.

21 Plaintiff also objects to Altria's negative framing of this instruction. Jury instructions should
 22 be neutral, rather than framing the issues negatively, e.g., telling the jury what is not a conspiracy.
 23 Identifying specific acts that do not constitute a conspiracy would lead to imbalanced instructions,
 24 unless the Court also were to identify specific acts that *do* constitute a conspiracy. Plaintiff does
 25 not suggest that approach because it would lead to an endless series of instructions. The Court
 26 should simply state the law. For instance, Altria cites to this District's decision in *Just Film*, but
 27 their proposed instruction is far afield from the discussion in that case. The court wrote as follows
 28 when describing the legal standard in *Just Film*:

1 To state a claim under § 1962(d), plaintiffs must “allege either an agreement that is
2 a substantive violation of RICO or that the defendants agreed to commit, or
3 participated in, a violation of two predicate offenses.” The conspiring defendants
must be alleged to “have been ‘aware of the essential nature and scope of the
enterprise and intended to participate in it.’”

4 *Just Film, Inc. v. Merch. Servs., Inc.*, No. C 10-1993 CW, 2010 WL 4923146, at *15 (N.D. Cal.
5 Nov. 29, 2010) (citations omitted).

RICO—Racketeering Conspiracy—Knowledge Required⁴⁶

Plaintiff must prove that Altria joined the conspiracy knowing the conspiracy's purpose and intending to facilitate it. Altria must have been aware of the essential nature and scope of the conspiracy and intend to participate in it. A person or entity that does not have knowledge of a conspiracy, but who happens to act in a way that advances some object or purpose of the conspiracy, does not become a conspirator.

Plaintiff must prove that Altria agreed to participate in the conspiracy with the knowledge and intent that at least one member of the racketeering conspiracy would intentionally commit, or cause, or aid and abet the commission of, two or more racketeering acts. You must agree on at least two acts of racketeering the co-conspirators understood would be committed. But Plaintiff is not required to prove that Altria personally committed, or agreed to personally commit, two or more racketeering acts.

⁴⁶ *Planned Parenthood Fed. of Am., Inc.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 68

**[Contested, Altria-Proposed] RICO 18 U.S.C. § 1962(d) –
Conspiracy Liability Limited Based on when Altria Joined the Alleged Conspiracy**

ALTRIA’S PROPOSAL:

If you conclude that a conspiracy existed and that Altria joined the conspiracy, you must then determine when Altria joined and thus was a member of the conspiracy.

If you find that Altria joined the conspiracy on a certain date, Altria would not be liable for any conduct that occurred before joining the conspiracy.

ALTRIA’S POSITION:

Altria’s proposed instruction is supported by ample case law that holds that a RICO “co-conspirator is only liable for the overt acts committed after he joined the unlawful agreement.” *Mattel, Inc. v. MGA Ent., Inc.*, No. 04-CV-09049, 2010 WL 11463911, at *4 (C.D. Cal. Sept. 3, 2010); *see also, e.g., Bryant v. Mattel, Inc.*, No. 04-CV-09049, 2010 WL 3705668, at *14 (C.D. Cal. Aug. 2, 2010). As the Ninth Circuit has explained when addressing conspiracy liability, “a defendant cannot be held liable for substantive offenses committed before joining or after withdrawing from a conspiracy.” *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992); *see also, e.g., Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, No. 11-CV-02861, 2013 WL 2386635, at *6 (N.D. Cal. May 30, 2013) (similar); *McNeil v. Yale Univ.*, 436 F. Supp. 3d 489, 524 (D. Conn. 2020) (similar).

Altria’s proposed instruction is necessary here to ensure that the jury understands the limits on RICO conspiracy liability and to prevent the jury from imposing conspiracy liability for conduct that does not support that liability. The proposed instruction is especially critical here given that Plaintiff does not allege that Altria joined the purported conspiracy when it was formed. Plaintiff, for example, claims that the alleged conspiracy was formed and began to engage in racketeering activity that harmed Plaintiff long before Altria is alleged to have had any relationship with JLI. In the absence of Altria’s proposed instruction here, the jury is likely to think that Altria can be liable for racketeering activity undertaken before Altria joined any conspiracy. That understanding is contrary to the case law set forth above. Altria’s proposed instruction is necessary to avoid such outcomes.

Plaintiff relies on this Court's class certification order (citing *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002)), and *United States v. Umagat*, 998 F.2d 770, 772 (9th Cir. 1993). Neither decision support its position. The court in *Oki Semiconductor* did not conclude that a defendant would be liable for a conspiracy's conduct from the time it was formed regardless of when that defendant joined the conspiracy. To the contrary, *Oki Semiconductor* addressed whether plaintiffs could amend to add a § 1962(d) conspiracy claim and concluded in *dicta* that they could not there based on *respondeat superior*. 298 F.3d at 776. And *Umagat* was neither a RICO case nor a civil conspiracy case, and the facts at issue in that case were fundamentally different from those presented here. 998 F.2d at 772.

PLAINTIFF'S POSITION:

Plaintiff objects to this instruction because it is factually unsupported and legally incorrect. It is factually unsupported because Plaintiff's claim is that all of the conduct at issue, including JLI's conduct before 2017 and Altria's conduct afterwards, contributed to the same indivisible current-existing injury. Plaintiff's proposed causation instruction tells the jury it must find that Altria's conduct contributed to Plaintiff's injury. There is therefore no factual basis for the jury to find liability based only on conduct for which Altria bears no responsibility.

If the Court elects to give this instruction, Plaintiff requests the following language be included:

Events that occurred before a conspirator joined a conspiracy may be considered by you to prove the nature and scope of the conspiracy at the time the person joined.

Even if the facts were different, Altria's proposed instruction would be legally incorrect. As this Court found in its Order on Motion for Class Certification, "[u]nder Ninth Circuit precedent, all defendants who participated in the RICO enterprise are liable for the entire injury caused by the enterprise's illegal conduct, regardless of whether they personally participated in every aspect of the conspiracy." ECF 3327 at 30 (citing *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002) ("[T]he damage wrought by the conspiracy 'is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'"); *United States v. Umagat*, 998 F.2d 770, 772 (9th Cir. 1993) ("One may join a conspiracy already formed

1 and in existence, and be bound by all that has gone before in the conspiracy, even if unknown to
2 him.””) (quoting *United States v. Bibbero*, 749 F.2d 581, 588 (9th Cir.1984)).

3 Altria relies on *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992), but that case
4 held only that a defendant was not liable for fraudulent acts committed after he *withdrew* from a
5 conspiracy. Here, there is no factual basis for Altria to assert a withdrawal defense.

[Contested, Altria-Proposed] RICO 18 U.S.C. § 1962(d) – Withdrawal from Conspiracy**ALTRIA’S PROPOSAL:**

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with the Ninth Circuit’s model instructions. Ninth Circuit Model Crim. Instr. 11.5. It is also supported by RICO case law. This instruction is also necessary to explain the applicable standard, focus the jury’s attention on the correct issues, and prevent confusion and potential prejudice to Altria. To the extent that the jury finds that Altria joined and became a member of the alleged enterprise, it should be instructed on how to determine whether Altria subsequently withdrew from that conspiracy. This is critically important, since Altria’s liability for conspiracy would terminate upon withdrawal.

Plaintiff objects to this instruction as lacking a sufficient factual basis. To the contrary, Altria submits that Plaintiff’s conspiracy claim itself lacks a sufficient factual basis. If the Court rejects this argument, however, at a minimum it should instruct the jury that a defendant can withdraw from any conspiracy that the jury might conclude it has joined.

PLAINTIFF’S POSITION:

Plaintiff objects to this instruction because there is no factual basis for concluding that Altria withdrew from the RICO conspiracy during the relevant time period. In addition, Altria claims that this instruction is “supported by RICO case law,” but provides no such case law.

1 **[Contested, Altria-Proposed] RICO 18 U.S.C. § 1962(d) – Different Schemes of Misconduct**
2 **ALTRIA’S PROPOSAL:**

3 If you find that Altria is a member of another conspiracy, but not the one Plaintiff alleged,
4 then you cannot find Altria liable in this case. Put another way, you cannot find that Altria violated
5 section 1962(d) unless you find that Altria was a member of the conspiracy alleged – not some
6 other separate conspiracy.

7 **ALTRIA’S POSITION:**

8 Altria’s proposal is necessary to focus the jury on the conspiracy that Plaintiff claims Altria
9 joined when determining whether Plaintiff has proven a claim under section 1962(d).

10 **PLAINTIFF’S POSITION:**

11 Plaintiff objects to this instruction because it is irrelevant. Plaintiff has the burden to prove
12 each Altria was a member of a RICO conspiracy and the elements for that claim are accurately set
13 forth in other instructions. Instructing that Altria cannot be held liable for some unnamed and
14 unalleged conspiracy wastes time and confuse the jury. Notably, Altria has not cited to any legal
15 authority or any pattern instruction that allegedly supports their position.

1 **[Contested, Altria-Proposed] RICO 18 U.S.C. § 1962(d) – Altria’s Alleged Involvement**

2 **ALTRIA’S PROPOSAL:**

3 Plaintiff claims that the alleged conspiracy conducted five separate schemes of misconduct:
 4 (1) the “fraudulent marketing scheme;” (2) the “youth access scheme;” (3) the “nicotine content
 5 misrepresentation scheme;” (4) the “flavor preservation scheme;” and (5) “the cover-up scheme.”
 6 Plaintiff alleges that Altria participated in conducting three schemes of alleged racketeering
 7 activity: a “nicotine content misrepresentation scheme;” a “flavor preservation scheme;” and a
 8 “cover-up scheme.” Plaintiff does not allege that Altria participated in directing the alleged
 9 “fraudulent marketing scheme” or “youth access scheme.” Accordingly, you cannot find Altria
 10 liable for alleged conspiracies and conduct of the “fraudulent marketing scheme” or the “youth
 11 access scheme.”

12 **ALTRIA’S POSITION:**

13 Altria’s proposed instruction is supported by case law that limits conspiracy liability to the
 14 conspiracy that a defendant agreed to join. “In a RICO conspiracy, as in all conspiracies, agreement
 15 is essential.” *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993) (quotation omitted). Plaintiffs
 16 “must show that defendants objectively manifested their agreement to participate in a racketeering
 17 enterprise through the commission of two or more predicate crimes.” *Avalos v. Baca*, 517 F. Supp.
 18 2d 1156, 1170 (C.D. Cal. 2007). It is the agreement that defines, and limits, the scope of a
 19 conspirator’s liability:

20 The extent of Defendants’ liability . . . is necessarily limited by the contours of their
 21 alleged conspiratorial agreement with [the alleged co-conspirators]. Thus, if
 22 Defendants and [and the alleged co-conspirators] agreed to perform scheme A in
 23 order to accomplish objective X, Defendants could be held liable for an act done by
 24 one or more of the conspirators pursuant to the scheme and in furtherance of the
 object. That does not mean, however, that the Defendants would also be liable for
 25 [an alleged co-conspirator’s] agreement with other individuals to perform scheme B
 to accomplish objective Y.

25 *Master-Halco, Inc. v. Scillia, Dowling & Ntarelli, LLC*, 739 F. Supp. 2d 104, 106-07 (D. Conn.
 26 2010); *see also, e.g., Bazzi v. City of Dearborn*, 658 F.3d 598, 602-03 (6th Cir. 2011) (plaintiff
 27 alleged two conspiracies but only one conspiracy included certain defendant, who did not share
 28 “conspiratorial objective” and thus would not be liable for acts furthering the second conspiracy)

(citation and quotations omitted); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002) (similar).⁴⁷ Given these requirements, Altria can only be liable for injuries allegedly caused by actions that were taken to further an allegedly unlawful objective that it had agreed to pursue. *See, e.g., Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985) (plaintiff can only be liable for acts taken by the conspiracy that included them).

Altria's proposed instruction is necessary to ensure that the jury understands the limits upon RICO conspiracy liability and prevent the jury from imposing conspiracy liability for conduct that does not support that liability. The proposed instruction is especially critical here given that Plaintiff does not allege that Altria was involved in each of the separate schemes that the purported conspiracy included. Plaintiff, for example, does not allege that Altria was ever involved in two of the alleged schemes to defraud. *See supra*. Because Altria never agreed to take part in these schemes, it did not conspire to conduct an enterprise that was engaged in these schemes through a pattern of racketeering activity, and Plaintiff's conspiracy claims again fail. In the absence of Altria's proposed instruction here, the jury is likely to think that Altria can be liable for racketeering activity that pertained to schemes that were outside of any conspiracy that included Altria. That understanding is contrary to the case law set forth above. Altria's proposed instruction is necessary to avoid such outcomes.

PLAINTIFF'S POSITION:

Plaintiff objects to this instruction because it is irrelevant and legally incorrect. The instruction also reads like an argument and is, therefore, imbalanced. The court should not instruct the jury as to whether it can or cannot hold Altria liable.

Regardless, the instruction is inconsistent with the facts and law. As this Court previously held "[t]he five schemes identified by plaintiffs, interrelated and together, establish the overall pattern of racketeering activity alleged. That Altria was only directly involved in some of the racketeering activity is not significant. Under Ninth Circuit precedent, all defendants who

⁴⁷ These common law conspiracy decisions are relevant to Plaintiff's RICO claims for conspiracy here. *See, e.g., Beck v. Prupis*, 120 S. Ct. 1608, 1615 (2000) ("We presume, therefore, that when Congress established in RICO a civil cause of action for a person 'injured . . . by reason of' a 'conspir[acy],' it meant to adopt these well-established common-law civil conspiracy principles.") (citations and quotations omitted).

1 participated in the RICO enterprise are liable for the entire injury caused by the enterprise's illegal
2 conduct, regardless of whether they personally participated in every aspect of the conspiracy."
3 Order on Mot. for Class Certification, ECF 3327 at 30. The schemes alleged by Plaintiff are
4 interrelated and together form the course of conduct that is one fraudulent scheme.

5 In addition, as already addressed, Plaintiff has the burden of proof and should have the
6 freedom to choose how to present the facts to the jury, rather than being limited to a specific framing
7 of the issues because those words are in the complaint. This Court's motion to dismiss order simply
8 explained the nature of the allegations against Altria; it did not suggest that the jury would need to
9 be instructed in this matter. *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 533
10 F. Supp. 3d 858, 866 (N.D. Cal. 2021). The case has been developed through evidence since the
11 complaint was filed, and Plaintiff should be permitted to explain to the jury what the subparts of
12 the Defendants' overall scheme were, if the Plaintiff chooses to discuss subparts at all.

13 Finally, Altria's approach is inconsistent with Ninth Circuit law holding that the Court
14 should not "dismember" the conspiracy. Because all conspirators are jointly and severally liable, it
15 would be illogical, confusing, and legally incorrect to instruct the jury that Altria may only be held
16 liable for parts of the conspiracy. *See* ECF 3327 at 30 (citing *Oki Semiconductor Co. v. Wells Fargo*
17 *Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002) ("[T]he damage wrought by the conspiracy 'is
18 not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a
19 whole.'").

**[Contested, Competing Proposals] [Plaintiff-Proposed] RICO –
Causation / [Altria-Proposed] RICO – Injury and Causation**

PLAINTIFF’S PROPOSAL:

If you find that Altria conducted or participated in the affairs of a racketeering enterprise through a pattern of racketeering, or conspired to do so, you must also determine whether Plaintiff has proved by a preponderance of the evidence that the violation caused Plaintiff an injury to its business or property before you may find for the Plaintiff. This requirement will be satisfied if the damages are caused by the predicate acts committed by Altria or a co-conspirator or if the damages are caused by the pattern of acts as a whole, or both. In either case, you must find that there was some direct relationship between the injury the Plaintiff has asserted and the alleged violation in question.

ALTRIA’S PROPOSAL:

If you find that Altria violated RICO by conducting or participating in the conduct of the affairs of a racketeering enterprise through a pattern of racketeering, or conspired to do so, you must then determine whether Plaintiff has proved by a preponderance of the evidence that the violation caused Plaintiff an injury to its business or property. I will first describe for you what Plaintiff must prove to establish injury to business or property under RICO. I will then explain what Plaintiff must prove to demonstrate that Altria caused any such injury to business or property.

PLAINTIFF’S POSITION:

Plaintiff’s proposed instruction accurately tells the jury both that it must find proximate cause between proven RICO violations and injury to business or property, and that in doing so it must consider the relevant predicate acts or the pattern of acts.

Altria’s proposal intentionally omits information, thereby creating the need for additional instructions.

Altria objects to Plaintiff’s proposed instruction as “contrary to the law,” but its position statement fails to explain why Plaintiff’s position is incorrect. Instead, Altria argues for its approach of intentionally omitting information for the purpose of doling out crumbs of information in a series of instructions. This Court should reject such an unnecessarily confusing approach.

1 Altria also believes that the Court should elaborate on “injury to business or property” in a
 2 series of instructions. But, as laid out below, all of those instructions are objectionable and should
 3 not be given.

4 **ALTRIA’S POSITION:**

5 Altria objects to portions of the Plaintiff’s proposed instruction as contrary to the law,
 6 incomplete, and prejudicial. Altria discusses the basis for these objections in more detail below
 7 and explains why Altria’s own proposal is more appropriate than the Plaintiff’s proposal.

8 Altria’s instruction is consistent with RICO’s plain language and case law applying that
 9 language. As § 1964(c) provides, “[a]ny person injured in his business or property by reason of a
 10 violation of [18 U.S.C. § 1962] may sue therefore in any appropriate United States district
 11 court” 18 U.S.C. 1964(c); *see also, e.g., Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969,
 12 972 (9th Cir. 2008) (“[A] civil RICO plaintiff must show: (1) that his alleged harm qualifies as
 13 injury to his business or property; and (2) that his harm was ‘by reason of’ the RICO violation,
 14 which requires the plaintiff to establish proximate causation.”). Although Plaintiff’s proposal
 15 makes several of the same points as Altria’s proposal, where the two proposals diverge, Altria’s
 16 proposal tracks the statutory language more closely and thus should be adopted. In addition,
 17 Plaintiff’s proposal is broader because it attempts to describe the requirements of injury and
 18 causation in this single instruction with little subsequent elaboration concerning these critical, and
 19 complex, requirements. In doing so, Plaintiff’s approach fails to identify and explain several
 20 important concepts concerning these requirements that are extremely relevant to the claims and
 21 theories that will be offered to the jury. By contrast, Altria proposes additional instructions on the
 22 injury and causation requirements to address those issues in the proposed instructions that follow.

23 Finally, Plaintiff accuses Altria of “intentionally omitting information for the purpose of
 24 doling out crumbs of information in a series of instructions.” While colorfully stated, Plaintiff’s
 25 claim is incorrect. Altria includes additional instructions that clarify RICO’s “injury to business or
 26 property” and causation requirements in order to adequately inform the jury about these
 27 requirements. As set forth below, these additional instructions are consistent with controlling
 28 precedent and necessary to explain these requirements, especially given the distinction between

1 injury and causation under RICO and the causation and injury requirements for Plaintiff's other
2 claims.

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[Contested, Altria-Proposed] RICO – Injury Requires Concrete Financial Loss

ALTRIA'S PROPOSAL:

RICO limits a Plaintiff to recovery for injuries to its business or property and limits what those injuries include. Injury to business or property requires proof that Plaintiff incurred a concrete financial loss as a result of racketeering activity that Altria conducted or participated in conducting.

ALTRIA'S POSITION:

Altria's proposed instruction is consistent with and supported by RICO case law that has made clear that "a showing of injury [to business or property] requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest." *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994); *see also, e.g., Oscar v. Univ. Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc) (RICO's "showing of 'injury' requires proof of concrete financial loss"); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (finding "beyond dispute" that the plaintiffs suffered "no financial loss" as terminated board members whose insurance policies were canceled were later compensated by the company and provided with replacement policies); *First Pac. Bancorp., Inc. v. Bro.*, 847 F.2d 545, 547 (9th Cir. 1988) ("Absent damages, a RICO claim cannot be sustained.").

Altria's proposed instruction is needed here to ensure that the jury understands RICO's "injury to business or property" requirement and the limits that apply to this requirement. As the Ninth Circuit has explained, RICO's "injury to business or property" requirement "has a restrictive significance" that "helps to assure that RICO is not expanded to [provide] a federal cause of action and treble damages to every tort plaintiff." *Steele*, 36 F.3d at 70. The importance of making clear to the jury the confines of RICO's injury to business or property is especially critical given the claims and evidence at issue in this case. In addition to RICO, Plaintiff brings claims for nuisance and negligence and is likely to offer evidence concerning purported impacts on or harm to Plaintiff that would not qualify as injury to business or property. Altria's proposed instruction is appropriate and necessary to ensure that the jury understands the applicable standard and focuses on the correct issues and to avoid confusion and prejudice to Altria.

1 **PLAINTIFF’S POSITION:**

2 Plaintiff objects to the proposed instruction as misstating the law and likely to confuse the
 3 jury. While the Ninth Circuit has at times used the phrase “concrete financial loss,” it has done so
 4 in the context of determining whether a plaintiff had standing to bring a RICO claim. *See, e.g.,*
 5 *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70–71 (9th Cir. 1994); *Oscar v. Univ. Students Co-op.*
 6 *Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.
 7 1990). Altria does not cite, and Plaintiff is not aware of, any case suggesting that a jury should be
 8 instructed using the phrase “concrete financial loss.”

9 The RICO statute does not reference a “concrete financial loss.” It states that any person
 10 “injured in his business or property by reason of a violation of section 1962 of this chapter may sue
 11 therefor” 18 U.S.C. § 1964(c). Notably, the *Oscar* case used a variety of ways to describe the
 12 injury requirement. The court did reference a “concrete financial loss” once. *Oscar*, 965 F.2d at
 13 785. But the court also described the requirement as a “tangible financial loss.” *Id.* Later, the court
 14 clarified that RICO provides a remedy for “harm to business and property only,” as contrasted with
 15 personal injuries. *Id.* at 786. Finally, the court explained that a plaintiff must “demonstrate a
 16 financial loss to her business or property.” *Id.*

17 A more recent Ninth Circuit decision made clear that the base requirement is simply
 18 financial loss that is connected to a business or property interest, rather than a particular type of
 19 financial loss—e.g., “concrete” or “tangible.” *Diaz v. Gates*, 420 F.3d 897, 898-900 (9th Cir. 2005).
 20 The *Diaz* court wrote that the *Oscar* standard had been “clarified” by subsequent caselaw. *Id.* at
 21 899. Applying that standard, the court held that lost wages constituted injury to business or property
 22 under RICO. *Id.* at 898-900. The standard employed by the Ninth Circuit required the plaintiff to
 23 prove harm to a “specific property interest.” *Id.* at 900.

24 Thus, the word “concrete” is not a precise legal standard; rather, it is a word that courts
 25 sometimes use as part of their analysis, and its relevance is questionable post-*Diaz*. The phrase
 26 “concrete financial loss” should not be part of the jury instructions. In this case, the word “concrete”
 27 carries a particular risk of jury confusion because it suggests the need for receipts—i.e., payments
 28 already made. Yet, the law is clear that an out-of-pocket loss is not required to make a viable RICO

1 claim. *In re Volkswagen “Clean Diesel” Mktg. Sales Pracs. & Prods. Liab. Litig.*, MDL No. 2672,
2 2017 WL 4890594, at *5 (N.D. Cal. Oct. 30, 2017). SFUSD’s losses come mostly in the form of
3 expenditures that it needs to make but has not yet been able to afford.

4 Both sides’ proposed jury instructions on causation inform the jury that they must find an
5 injury to SFUSD’s business or property to hold Altria liable. That approach is sufficient.

1 **[Contested, Altria-Proposed] RICO – Injury Excludes Costs of Governmental Functions**

2 **ALTRIA’S PROPOSAL:**

3 Injury to business or property does not include harm that a government entity like Plaintiff
4 may incur when performing its governmental functions. Instead, Plaintiff can only recover for
5 expenditures that it made in the ordinary marketplace as a consumer.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction is consistent with and supported by RICO case law. In *Canyon*
8 *County v. Syngenta Seeds, Inc.*, the Ninth Circuit made clear that, “[w]hen a governmental body
9 acts in its sovereign or quasi-sovereign capacity, seeking to enforce the laws or promote the public
10 well-being, it cannot claim to have been injured in its property for RICO purposes based solely on
11 the fact that it has spent money in order to act governmentally.” 519 F.3d 969, 972, 975 (9th Cir.
12 2008). As the court explained, it is “inappropriate to label a governmental entity ‘injured in its
13 property’ when it spends money on the provision of additional public services, given that those
14 services are based on legislative mandates and are intended to further public interest.” *Id.*; *see also*,
15 *e.g.*, *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 650 (N.D. Cal.
16 2020) (“*Canyon County* established that governmental entities *cannot* assert a RICO claim based
17 on expenditures or services provided in their sovereign or quasi-sovereign capacities.”); *Welborn*
18 *v. Bank of New York Mellon Corp.*, 557 F. App’x 383, 387 (5th Cir. 2014) (“A government cannot
19 claim damages for general injury to the economy or ‘to the Government’s ability to carry out its
20 functions.’”) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265 (1972)).

21 Altria’s proposed instruction is needed here to ensure that the jury understands RICO’s
22 “injury to business or property” requirement and the limits that surround this requirement. As the
23 Ninth Circuit has explained, RICO’s “injury to business or property” requirement “has a restrictive
24 significance” that “helps to assure that RICO is not expanded to [provide] a federal cause of action
25 and treble damages to every tort plaintiff.” *Steele*, 36 F.3d at 70. The importance of making clear
26 to the jury the confines of RICO’s injury to business or property, and the exclusion of costs incurred
27 by a plaintiff acting in a governmental capacity from injury, is especially critical given the claims
28 and evidence at issue in this case. Plaintiff intends to offer evidence of costs paid by Plaintiff to

1 provide services and other resources that were made by Plaintiff when acting in its governmental
 2 capacity. Under *Canyon County*, such costs would not qualify as “injury to business or property”
 3 and cannot be recovered under RICO. Altria’s proposed instruction is appropriate and necessary
 4 to ensure that the jury understands the applicable standard and focuses on the correct issues and to
 5 avoid confusion and prejudice to Altria.

6 Plaintiff’s only objection to this proposed instruction is that it is irrelevant because Plaintiff
 7 seeks to recover for injury to business or property. This argument fails. Plaintiff’s summary
 8 judgment opposition, for example, makes clear that one argument they intend to raise with respect
 9 to their RICO claims is that Plaintiff suffered injury to business or property when providing services
 10 at schools within the school district. *See* Pl. SJ Opp.

11 **PLAINTIFF’S POSITION:**

12 This proposed instruction is irrelevant, legally inaccurate, and more of a legal argument
 13 than a jury instruction. The instruction is irrelevant, and therefore confusing, because Plaintiff’s
 14 claim is not based on the provision of government services; it is based on damages to its property
 15 interests, and damages necessary to remedy that injury. The instruction also misstates the law
 16 because Plaintiff’s recovery is not limited to expenditures in the marketplace. Damages based on
 17 harm to property interests (with property interests defined by state law) are also compensable under
 18 RICO. *See City & County of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 651 (N.D.
 19 Cal. 2020) (holding that *Canyon County* permitted municipality’s claim based on injury to property
 20 interest); *In re JUUL*, 497 F. Supp. 3d at 622 (recognizing the distinction, and holding that public
 21 entity plaintiffs had standing to bring RICO claims based on allegations of injury to property
 22 interest). The instruction also reads like an argument as to why damages should be limited. It is not
 23 proper language for a jury instruction.

**[Contested, Altria-Proposed] RICO –
Injury Excludes Costs Related to Addiction and Personal Injury**

ALTRIA’S PROPOSAL:

Expenditures made to address harm caused by physical injury, including addiction, do not establish injury to business or property.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with and supported by RICO case law. “Injury to business or property” does not include damages related to personal injuries. *See, e.g., RJR Nabisco, Inc. v. European Cmty*, 136 S. Ct. 2090, 2097 (2016) (“RICO’s private cause of action [is limited] to particular kinds of injury—excluding, for example, personal injuries.”). In addition to medical expenses and pain and suffering, “[f]inancial losses resulting from personal injury unquestionably are not recoverable under RICO.” *City & Cnty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1139 (N.D. Cal. 1997). This restriction precludes recovery under RICO for addiction-related expenditures. *See, e.g., Varney v. R.J. Reynolds Tobacco Co.*, 118 F. Supp. 2d 63, 73 (2000) (“[T]he accumulated costs of purchasing cigarettes during plaintiff’s many years of smoking . . . are certainly pecuniary, [but] they are not the sort of economic harms actionable under RICO. They are instead harms that derive from personal injuries.”); *Le Paw v. BAT Indus. PLC*, 1997 WL 242132, at *2 (E.D.N.Y. 1997) (rejecting argument that “RICO claim seek[ing] recovery only of ‘the expenses incurred in purchasing cigarettes caused by defendants’ scheme to addict” was a claim for injury to business or property); *Allman v. Philip Morris, Inc.*, 865 F. Supp. 665, 668-69 (S.D. Cal. 1994) (dismissing RICO claims for damages resulting from nicotine addiction, including the cost of nicotine patches; “under California law, money is considered ‘property,’ and therefore, the cost of purchasing a Nicotine Patch should be treated as an injury to property for purposes of § 1964(c)”).

Altria’s proposed instruction is needed here to ensure that the jury understands RICO’s “injury to business or property” requirement and the limits that apply to this requirement. As the Ninth Circuit has explained, RICO’s “injury to business or property” requirement “has a restrictive significance” that “helps to assure that RICO is not expanded to [provide] a federal cause of action

1 and treble damages to every tort plaintiff.” *Steele*, 36 F.3d at 70. The importance of making clear
 2 to the jury the confines of RICO’s injury to business or property, and the exclusion of costs incurred
 3 to address addiction from injury, is especially critical given the claims and evidence at issue in this
 4 case. Plaintiff intends to offer evidence to the jury concerning addiction to JUUL and costs to
 5 address students’ addiction. The case law cited above makes clear that addiction-related treatment
 6 such as counseling or education are personal injury damages that do not constitute injury to business
 7 or property and do not support a RICO claim. Altria’s proposed instruction is therefore appropriate
 8 and necessary to ensure that the jury understands the applicable standard and focuses on the correct
 9 issues and to avoid confusion and prejudice to Altria.

10 Plaintiff’s only objection to this proposed instruction is that it is irrelevant because this is
 11 not a personal injury case. Whether this is a “personal injury case” is beside the point. It is clear
 12 that Plaintiff intends to offer evidence concerning addiction-related expenses. *See* Pl. SJ Opp. The
 13 jury should be instructed, consistent with the case law set out above, that those expenses do not
 14 constitute injury to business or property under RICO.

15 Plaintiff’s argument that the Court “should endeavor to keep the instructions simple and
 16 straight-forward for the jury” supports this instruction. The instruction is written in a “simple and
 17 straightforward” manner and correctly explains what does not qualify as injury to business or
 18 property, which is necessary here given the evidence likely to be offered at trial.

19 **PLAINTIFF’S POSITION:**

20 Plaintiff objects to this instruction as irrelevant and, therefore, confusing to the jury. SFUSD
 21 is not seeking damages based on physical injuries. It is seeking damages based on the untenable
 22 condition at its schools, in the past and in the present, based on the vaping epidemic caused by the
 23 Defendants. Any individual’s claim for personal injury is not a part of this lawsuit.

24 A bigger picture point that applies to this and many other proposed instructions is, the
 25 instructions Plaintiff has proposed adequately inform the jury as to what they *should* consider in
 26 evaluating the claims. It is unnecessary, confusing, and prejudicial to the Plaintiff to issue a series
 27 of instructions as to what the jury *should not* consider, as Altria is asking the Court to do. The Court
 28 should endeavor to keep the instructions simple and straight-forward for the jury.

1 Plaintiff's proposed RICO causation instruction informs the jury that Plaintiff has the
2 burden to prove "by a preponderance of the evidence that the violation caused Plaintiff an injury to
3 its business or property." That instruction adequately informs the jury that SFUSD's damages
4 cannot be based on personal injury. Further, the entire concept of a school district suffering personal
5 injury makes no sense, and therefore Defendants' proposed instruction would confuse the jury. The
6 legal prohibition cited by Defendants precludes recovering for expenses directly flowing from
7 personal injuries. *See, e.g., City & Cnty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130,
8 1139 (N.D. Cal. 1997) ("Here, on the other hand, case law dictates that the actual injury being
9 claimed, medical expenses flowing from smoking-related illness, is a purely personal injury."). As
10 this Court has recognized, that is not the aim of SFUSD or any other government entity plaintiff.
11 *See In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552,
12 646-47 (N.D. Cal. 2020) (rejecting argument that government entities' nuisance claims were
13 disguised product liability claims).

1 **[Contested, Altria-Proposed] RICO – Injury Excludes Third Party Expenditures**

2 **ALTRIA’S PROPOSAL:**

3 If a third party incurred expenses on behalf of Plaintiff, those expenses would not constitute
4 injury to business or property and Plaintiff cannot recover for those expenses.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g.,*
7 *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994) (no RICO “injury” because they “paid
8 none of the allegedly excessive charges out of their own pockets because those charges were
9 covered by insurance.”); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (finding
10 “beyond dispute” that the plaintiffs suffered “no financial loss” as terminated board members
11 whose insurance policies were canceled were later compensated by the company and provided with
12 replacement policies); *Farmers Ins. Exchange v. First Choice Chiropractic & Rehabilitation*, 2015
13 WL 4506401, at *12 (D. Or. July 22, 2015) (granting defendant’s motion for summary judgment
14 on the plaintiff’s RICO claims because the plaintiff received third-party reimbursements for
15 fraudulent payments made to the defendant); *Oscar v. Univ. Students Co-op Ass’n*, 965 F.2d 783,
16 785 (9th Cir. 1992) (en banc) (reimbursed costs cannot support RICO standing).

17 Altria’s proposed instruction is needed here to ensure that the jury understands RICO’s
18 “injury to business or property” requirement and the limits that apply to this requirement. As the
19 Ninth Circuit has explained, RICO’s “injury to business or property” requirement “has a restrictive
20 significance” that “helps to assure that RICO is not expanded to [provide] a federal cause of action
21 and treble damages to every tort plaintiff.” *Steele*, 36 F.3d at 70. The importance of making clear
22 to the jury the confines of RICO’s injury to business or property, and the exclusion of costs
23 reimbursed or paid by third parties from injury, is especially critical given the claims and evidence
24 at issue in this case. Plaintiff intends to offer evidence concerning expenses that were paid or
25 reimbursed by third parties. *See* Pl. SJ. Opp. Altria’s proposed instruction is therefore appropriate
26 and necessary to ensure that the jury understands the applicable standard and focuses on the correct
27 issues and to avoid confusion and prejudice to Altria.

28 Plaintiff’s only objection to this proposed instruction is that it lacks a factual basis. This

1 argument is meritless. As noted, Plaintiff has offered evidence of costs that were reimbursed by a
2 third party or paid by a third party as support for its claims in this case. The jury should be properly
3 instructed that such evidence cannot establish RICO injury to damages or property.

4 **PLAINTIFF’S POSITION:**

5 Plaintiff objects to this instruction because there is no factual basis for it, and therefore it
6 would confuse the jury to be instructed on this issue. To the extent Plaintiff is making claims to
7 reimburse out-of-pocket expenses, Plaintiff made those payments itself. That a school district used
8 public funds in making those payments is neither surprising nor relevant. Plus, the grants did not
9 require any funds to be used in any particular manner. *See* Pl. MSJ Resp. Br. at 85-86.

10 Altria is simply wrong in stating that “Plaintiff has offered evidence of costs that were
11 reimbursed by a third party or paid by a third party as support for its claims in this case.” As laid
12 out in its summary judgment response, Plaintiff has received general grants and then used its own
13 funds in a manner of its choosing, without reimbursement. *See id.* This case, therefore, is very
14 different from cases like *Steele* where the court found no RICO injury because the plaintiff “paid
15 none of the allegedly excessive charges out of their own pockets because those charges were
16 covered by insurance.” *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994).

1 **[Contested, Altria-Proposed] RICO – Injury Excludes Costs for Prospective Relief**

2 **ALTRIA’S PROPOSAL:**

3 The costs associated with or estimated for addressing harms that may arise in the future do
4 not constitute injury to business or property under RICO and Plaintiff cannot recover for those
5 costs.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g.,*
8 *Martinez v. Quality Loan Serv. Corp.*, No. CV 08-07767MMMPJWX, 2009 WL 586725, at *9
9 (C.D. Cal. Feb. 10, 2009) (“Prospective injuries likewise do not satisfy RICO’s concrete financial
10 injury requirement.”); *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1204 (C.D. Cal. 2008)
11 (same); *Ferguson v. Moeller*, No. 2:16-CV-41, 2016 WL 4530383, at *9 n.12 (W.D. Pa. Aug. 30,
12 2016) (“Plaintiffs cannot base their RICO theory on any prospective injuries that may have been
13 suffered.”).

14 Altria’s proposed instruction is needed here to ensure that the jury understands RICO’s
15 “injury to business or property” requirement and the limits that apply to this requirement. As the
16 Ninth Circuit has explained, RICO’s “injury to business or property” requirement “has a restrictive
17 significance” that “helps to assure that RICO is not expanded to [provide] a federal cause of action
18 and treble damages to every tort plaintiff.” *Steele*, 36 F.3d at 70. The importance of making clear
19 to the jury the confines of RICO’s injury to business or property, and the exclusion of prospective
20 and future harms, is especially critical given the claims and evidence at issue in this case. Plaintiff
21 intends to offer evidence concerning expenses that would incur, if at all, in the future. *See* Pl. SJ.
22 Opp. Altria’s proposed instruction is therefore appropriate and necessary to ensure that the jury
23 understands the applicable standard and focuses on the correct issues and to avoid confusion and
24 prejudice to Altria. Plaintiff claims that it “needs a damages award to address the harm fully, the
25 damages are not prospective, they are realized, in the past and present.” These are factual
26 arguments that the jury should resolve that only confirm the appropriateness of this instruction.

27 **PLAINTIFF’S POSITION:**

28 Plaintiff objects to this instruction as legally inaccurate and lacking a factual basis. As with

1 the requirement of a “concrete financial loss,” Altria conflates a standing issue with a damages
2 question for the jury. The rule that prospective injuries do not confer standing is simply an
3 application of the rule requiring a concrete financial loss to obtain standing. *See, e.g., Martinez v.*
4 *Quality Loan Serv. Corp.*, No. 08-07767, 2009 WL 586725, at *9 (C.D. Cal. Feb. 10, 2009).

5 Further, Plaintiff does not base its RICO claim on injuries not yet incurred, so there is no
6 factual basis for such an instruction, and it would likely confuse the jury. The harm to SFUSD
7 exists now. Plaintiff’s experts—particularly Michael Dorn—lay out the measures necessary to fix
8 the *existing* problem. SFUSD has not taken those measures because it does not have the funds. But
9 while Plaintiff needs a damages award to address the harm fully, the damages are not prospective,
10 they are realized, in the past and present.

11 Plaintiff’s proposed instruction, which specifically references “damage to business or
12 property,” adequately informs the jury that hypothetical future damage is not at issue. In addition,
13 Altria’s instruction creates a risk of confusion because, while the damage at issue is past and current
14 (not future), the remedy depends on finances obtained from this case because SFUSD currently has
15 a \$125 million budget deficit. *See* Pl. Summ. J. Resp. Br. at 42.

1 **[Contested, Altria-Proposed] RICO – Causation**

2 **ALTRIA’S PROPOSAL:**

3 If you find that Plaintiff has proven injury to business or property under RICO, you must
 4 determine whether that injury was caused by Altria’s violation of section 1962. Accordingly, if
 5 you found that Altria engaged in racketeering activity in violation of section 1962(c), you must
 6 decide whether that racketeering activity caused Plaintiff’s injury to business or property. If you
 7 found that Altria conspired to engage in racketeering activity and violated section 1962(d), you
 8 must determine whether the conspiracy’s conduct during the time Altria was a member of the
 9 conspiracy caused Plaintiff’s injury to business or property. Causation requires that Plaintiff prove
 10 cause-in-fact and legal or proximate causation.

11 **ALTRIA’S POSITION:**

12 Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g.,*
 13 *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (RICO requires “but for” causation
 14 and proximate causation); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (same); *Hemi*
 15 *Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010) (same). The proposed instruction is needed here to
 16 ensure that the jury understands RICO’s causation requirement and the necessary link that Plaintiff
 17 must establish between a violation of RICO, if the jury concludes that Plaintiff proved a violation,
 18 and any “injury to business or property” suffered by Plaintiff. RICO does not allow a Plaintiff to
 19 recover for injuries that are too far removed from the racketeering activity.

20 Providing the jury with sufficient instructions concerning the causal nexus required by
 21 RICO is particularly necessary in this case given the evidence that Plaintiff intends to offer at trial.
 22 Plaintiff claims to have been injured in its business or property based on alleged harm to the school
 23 district and schools within the district. The alleged racketeering activity concerns certain schemes
 24 related to the design, manufacture, marketing, and sale of JUUL. At most, any connection between
 25 the alleged RICO violations and the injury to business or property claims by Plaintiff would not be
 26 direct. Instead, any injuries would be several steps removed from Altria’s alleged conduct. Altria’s
 27 proposed instruction is therefore necessary to ensure that the jury understands the applicable
 28 standard and focuses on the correct issues when evaluating whether Plaintiff has proven causation

1 under RICO and to avoid confusion and prejudice to Altria.

2 **PLAINTIFF’S POSITION:**

3 Plaintiff objects to this instruction as duplicative, and therefore likely to confuse the jury.
4 The parties agree that the jury needs to be instructed on the RICO causation requirement. The
5 parties have issued their competing causation instructions above. Whichever version this Court
6 chooses, there is no need for additional instructions about RICO causation. Otherwise, the jury will
7 be confused as to why it is being instructed on the same issue twice.

8 Specifically, Plaintiff’s proposed instruction already includes the language very similar to
9 that proposed by Altria here, that “you must decide whether that racketeering activity caused
10 Plaintiff’s injury to business or property.” Altria adds a sentence about “but-for” and proximate
11 causation, but that concept is adequately captured by the following sentence in Plaintiff’s proposed
12 instruction: “you must find that there was some direct relationship between the injury the Plaintiff
13 has asserted and the alleged violation in question.”

1 **[Contested, Altria-Proposed] RICO – Cause-in-Fact**

2 **ALTRIA’S PROPOSAL:**

3 Cause-in-fact requires that Plaintiff prove the same harm would not have occurred but-for
4 Altria’s RICO violation.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g.,*
7 *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (RICO requires “but for” causation
8 and proximate causation); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (same). The
9 proposed instruction is needed here to ensure that the jury understands RICO’s causation
10 requirement and the necessary link that Plaintiff must establish between a violation of RICO, if the
11 jury concludes that Plaintiff proved a violation, and any “injury to business or property” suffered
12 by Plaintiff. RICO does not allow a Plaintiff to recover for injuries that are too far removed from
13 the racketeering activity.

14 Providing the jury with sufficient instructions concerning the causal nexus required by
15 RICO is particularly necessary in this case given the evidence that Plaintiff intends to offer at trial.
16 Plaintiff claims to have been injured in its business or property based on alleged harm to the school
17 district and schools within the district. The alleged racketeering activity concerns certain schemes
18 related to the design, manufacture, marketing, and sale of JUUL. At most, any connection between
19 the alleged RICO violations and the injury to business or property claims by Plaintiff would not be
20 direct. Instead, any injuries would be several steps removed from Altria’s alleged conduct.
21 Altria’s proposed instruction is therefore necessary to ensure that the jury understands the
22 applicable standard and focuses on the correct issues when evaluating whether Plaintiff has proven
23 causation under RICO and to avoid confusion and prejudice to Altria.

24 Plaintiff’s argument that the jury “will be confused” if they are given more than one
25 instruction on the requirement of causation is meritless, especially where Altria’s proposed
26 causation instructions address distinct issues related to causation.

27 **PLAINTIFF’S POSITION:**

28 Plaintiff objects to this instruction as duplicative and unnecessary, and therefore likely to

1 confuse the jury. The parties have issued their competing causation instructions above. Whichever
2 version this Court chooses, there is no need for additional instructions about RICO causation.
3 Otherwise, the jury will be confused as to why it is being instructed on the same issue twice.

4 More specifically, Plaintiff's proposed causation instruction tells jurors that they "must find
5 that there was some direct relationship between the injury the Plaintiff has asserted and the alleged
6 violation in question." This statement is adequate to inform the jury about the need to determine
7 that Altria caused the Plaintiff's harm.

1 **[Contested, Altria-Proposed] RICO Mail and Wire Fraud – Reliance**

2 **ALTRIA’S PROPOSAL:**

3 To establish that any RICO violation by Altria was the but-for cause of a particular injury
4 to business or property under RICO, Plaintiff must demonstrate that it incurred that injury because
5 someone believed false or fraudulent pretenses, representations, or promises by Altria, took action
6 in reliance on that belief, and that action caused Plaintiff to suffer that specific injury to business
7 or property.

8 **ALTRIA’S POSITION:**

9 Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g.,*
10 *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-66 (9th Cir. 2004) (reliance “provides a key
11 causal link” in RICO cases and “all plaintiffs asserting civil RICO claims[] must prove
12 individualized reliance where that proof is otherwise necessary to establish actual or proximate
13 causation”); *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*
14 *Ltd.*, 943 F.3d 1243, 1260 (9th Cir. 2019) (RICO plaintiffs must show “someone in the chain of
15 causation *relied* on Defendants’ alleged misrepresentations and omissions”).

16 Plaintiffs try to avoid reliance based on *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S.
17 639, 642, 655-58 (2008). *Bridge* did not eliminate a reliance requirement from RICO mail and
18 wire fraud claims. The Court held that *direct* reliance would not be required under the specific
19 facts presented in *Bridge*, since plaintiffs had not seen or even received the defendant’s alleged
20 misrepresentations. *Id.* at 659. But it made clear that it was *not* holding “that a RICO plaintiff who
21 alleges injury ‘by reason of’ a pattern of mail fraud can prevail without showing
22 that *someone* relied on the defendant’s misrepresentations.” *Id.* at 658-59 (emphasis in the
23 original). The Ninth Circuit relied on *Bridge* expressly in *Painters* when holding that “someone in
24 the chain of causation” must have “relied on Defendants’ alleged misrepresentations and
25 omissions.” 943 F.3d at 1260. As the Ninth Circuit explained, “logically, a plaintiff cannot even
26 establish but-for causation if *no one* relied on the defendant’s alleged misrepresentation.” *Id.*

27 These decisions confirm that reliance is required in RICO mail and wire fraud cases. They
28 also show that reliance may be “indirect” in certain cases where there was no direct link between

defendant and plaintiffs such that direct reliance is not possible. But there is nothing to suggest that reliance need not be proven by plaintiffs who were exposed to the alleged fraud and are capable of proving direct reliance. To the contrary, courts since *Bridge* continue to recognize that, “in [RICO] cases arising from fraud, a plaintiff’s ability to show a causal connection between defendants’ misrepresentation and his or her injury will be predicated on plaintiff’s alleged reliance on that misrepresentation.” *CGC Holding*, 773 F.3d at 1089; *see also, e.g., Allstate Ins. Co. v. Palterovich*, 653 F. Supp. 2d 1306, 1323 (S.D. Fla. 2009) (similar). The Court should therefore include the language proposed by Altria.

The proposed instruction is needed here to ensure that the jury understands RICO’s causation requirement and what Plaintiff must establish between a violation of RICO, if the jury concludes that Plaintiff proved a violation, and any “injury to business or property” suffered by Plaintiff. It is further necessary to make clear to the jury that this causal connection requires that Plaintiff establish reliance by someone in the chain of causation. RICO does not allow a Plaintiff to recover for injuries that are too far removed from the racketeering activity. Moreover, a claim based on mail and wire fraud requires that someone has been deceived by the defendant’s false statements.

Providing the jury with sufficient instructions that Plaintiff must establish reliance to prove its RICO claims is particularly necessary in this case given the evidence that Plaintiff intends to offer at trial. Plaintiff is bringing RICO claims based on alleged acts of mail and wire fraud. Plaintiff claims to have been injured in its business or property based on alleged harm to the school district and schools within the district. On its face, the connection between the alleged RICO violations and the injury to business or property claims by Plaintiff are not direct, and Altria’s conduct is several steps removed from those injuries. Altria’s proposed instruction is therefore necessary to ensure that the jury understands the applicable standard and focuses on the correct issues when evaluating whether Plaintiff has proven causation under RICO and to avoid confusion and prejudice to Altria.

PLAINTIFF’S POSITION:

Plaintiff objects to this instruction as a misstatement of the law. The Supreme Court reached

1 the exact opposite conclusion in *Bridge*, and the passage Altria cite is *dictum*. In *Bridge*, the Court
 2 held that reliance *is not* an element of a RICO claim. *See Bridge v. Phoenix Bond & Indem. Co.*,
 3 553 U.S. 639, 649 (2008) (holding that “no showing of reliance is required to establish that a person
 4 has violated § 1962(c) by conducting the affairs of an enterprise”). Later, *Bridge* noted that many
 5 fact patterns would involve reliance by someone. But it was not stated as an required element of
 6 the claim, and the Court even used the language “in most cases.” *Id.* at 658. Further, as discussed
 7 above, in *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd.*,
 8 943 F.3d 1243 (9th Cir. 2019), the court noted the similarity in the fact patterns of *Bridge*—an
 9 indirect reliance case—and that case, involving prescription drugs. *Id.* at 1259-60. But the Ninth
 10 Circuit did not state reliance as a rule—nor could it, given that the Supreme Court has disclaimed
 11 such a rule. Certainly, such a rule requiring reliance on a misrepresentation would be illogical in
 12 cases like this one that depend, at least in part, on fraud by omission.

13 Another key point, absent from Altria’s proposed instruction, is that fraud can be based
 14 on withholding of material information, not just the delivering of false information. *See, e.g., In re*
 15 *JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 612 (N.D. Cal.
 16 2020) (holding that RICO allegations as to Bowen were sufficient, based on alleged “fraudulent
 17 misrepresentations or omissions regarding [JUUL’s] intentional addictiveness and method of
 18 nicotine delivery”); *see also In re Epogen & Aranesp Off-Label Mktg. & Sales Pracs. Litig.*, 590
 19 F. Supp. 2d 1282, 1292 (C.D. Cal. 2008) (stating that if “Plaintiffs can identify specific
 20 representations by Defendants that are literally false, misleading, *or contain material omissions*,
 21 the claims are actionable under RICO”) (emphasis added). Altria’s instruction inadequately states
 22 the law by requiring reliance on a misrepresentation.

1 **[Contested, Altria-Proposed] RICO – Proximate Causation**

2 **ALTRIA’S PROPOSAL:**

3 Proximate causation requires some direct relation between the injury asserted and the
4 injurious conduct alleged, and cannot be too remote, purely contingent, or indirect. In order to find
5 that proximate causation exists, Altria’s conduct must have led directly to the Plaintiff’s harm.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction is consistent with and supported by RICO case law. *See, e.g.,*
8 *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (RICO requires proximate
9 causation); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (same). Proximate causation
10 requires “some direct relation between the injury asserted and the injurious conduct alleged” and
11 cannot be “too remote, purely contingent, or indirect.” *Hemi Grp., LLC v. City of New York*, 559
12 U.S. 1, 9 (2010) (quotations omitted); *see also, e.g., Lexmark Int’l, Inc. v. Static Control*
13 *Components, Inc.*, 572 U.S. 118, 133 (2014) (“The proximate cause requirement bars suits for
14 alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.”). “When a court
15 evaluates a RICO claim for proximate causation, the central question it must ask is whether the
16 alleged violation led directly to plaintiff’s injuries.” *Anza v. Ideal Steel Supply Corp.*, 547 U.S.
17 451, 461 (1991).

18 The proposed instruction is needed here to ensure that the jury understands RICO’s
19 causation requirement and the necessary link that Plaintiff must establish between a violation of
20 RICO, if the jury concludes that Plaintiff proved a violation, and any “injury to business or
21 property” suffered by Plaintiff. RICO does not allow a Plaintiff to recover for injuries that are too
22 far removed from the racketeering activity.

23 Providing the jury with sufficient instructions concerning the causal nexus required by
24 RICO is particularly necessary in this case given the evidence that Plaintiff intends to offer at trial.
25 Plaintiff claims to have been injured in its business or property based on alleged harm to the school
26 district and schools within the district. At most, any connection between the alleged RICO
27 violations and the injury to business or property claims by Plaintiff would not be direct. Instead,
28 any injuries would be several steps removed from Altria’s alleged conduct. Altria’s proposed

1 instruction is therefore necessary to ensure that the jury understands the applicable standard and
2 focuses on the correct issues when evaluating whether Plaintiff has proven causation under RICO
3 and to avoid confusion and prejudice to Altria.

4 Plaintiff's response to Altria's proposal asks the Court to adhere to the instruction given in
5 the *Planned Parenthood* case. The questions of causation presented in this case are drastically
6 different from, and far more complex, than those in *Planned Parenthood*. Both the alleged
7 racketeering activity and the alleged injury to business or property are broader in scope and different
8 in kind in this case when compared to those in *Planned Parenthood*. Moreover, any purported
9 connection between the alleged misconduct and Plaintiff's purported injuries are far more
10 attenuated. Accordingly, Altria's different and more detailed instructions on RICO's causation
11 requirement are necessary and appropriate here.

12 Plaintiff's argument that the jury "will surely be confused" if they are given more than one
13 instruction on the requirement of causation is meritless, especially where Altria's proposed
14 causation instructions address distinct issues related to causation.

15 **PLAINTIFF'S POSITION:**

16 Plaintiff again objects to this instruction as duplicative and unnecessary, and therefore likely
17 to confuse the jury. The parties have issued their competing causation instructions above.
18 Whichever version this Court chooses, there is no need for additional instructions about RICO
19 causation. Otherwise, the jury will be confused as to why it is being instructed on the same issue
20 twice.

21 Plaintiff's proposed instruction—taken from this Court's *Planned Parenthood*
22 instructions—tells jurors that they "must find that there was some direct relationship between the
23 injury the Plaintiff has asserted and the alleged violation in question." This "direct relationship"
24 language is essentially identical to the "direct relation" language in Altria's proposed instruction,
25 which is further evidence that it is not necessary and would only confuse the jury.

**[Contested, Altria-Proposed] RICO 18 U.S.C. § 1964(c) –
Damages Caused by Racketeering Activity**

ALTRIA’S PROPOSAL:

Even if you find Altria violated either or both sections of RICO, Plaintiff can recover only damages that were caused by the predicate acts—here either mail or wire fraud—constituting the pattern of racketeering activity that those claims are based on. It is not necessary that every predicate act caused damage to Plaintiff. But Plaintiff can only recover damages caused by predicate acts that are part of the pattern of racketeering activity.

ALTRIA’S POSITION:

Altria’s proposed instruction is consistent with the RICO statute. Section 1964(c), which creates the private cause of action under which Plaintiff seeks relief, provides that “[a]ny person injured in his business or property *by reason of a violation* of [18 U.S.C. § 1962] may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit.” 18 U.S.C. 1964(c). It is likewise consistent with decisions applying that provision. *See, e.g., Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008) (explaining that plaintiff under § 1964(c) must prove “that his harm was ‘by reason of’ the RICO violation”). Any objection by Plaintiff that Altria’s proposed instruction is legally incorrect therefore fails.

Moreover, Altria’s proposed instruction is needed here to ensure that the jury understands RICO’s causation requirement and the necessary link that Plaintiff must establish between a violation of RICO, if the jury concludes that Plaintiff proved a violation, and any “injury to business or property” suffered by Plaintiff. RICO does not allow a Plaintiff to recover for injuries that are too far removed from the racketeering activity. Providing the jury with sufficient instructions concerning the causal nexus required by RICO is particularly necessary in this case given the evidence that Plaintiff intends to offer at trial. Plaintiff claims to have been injured in its business or property based on alleged harm to the school district and schools within the district. At most, any connection between the alleged RICO violations and the injury to business or property claims by Plaintiff would not be direct. Instead, any injuries would be several steps removed from Altria’s

1 alleged conduct. Altria's proposed instruction is therefore necessary to ensure that the jury
 2 understands the applicable standard and focuses on the correct issues when evaluating whether
 3 Plaintiff has proven causation under RICO and to avoid confusion and prejudice to Altria.

4 Plaintiff's response to Altria's proposal asks the Court to adhere to the instruction given in
 5 the *Planned Parenthood* case. The questions of causation presented in this case are drastically
 6 different from, and far more complex, than those in *Planned Parenthood*. Both the alleged
 7 racketeering activity and the alleged injury to business or property are broader in scope and different
 8 in kind in this case when compared to those in *Planned Parenthood*. Moreover, any purported
 9 connection between the alleged misconduct and Plaintiff's purported injuries are far more
 10 attenuated. Accordingly, Altria's different and more detailed instructions on RICO's causation
 11 requirement are necessary and appropriate here.

12 **PLAINTIFF'S POSITION:**

13 Plaintiff objects to this instruction as unnecessary, duplicative, and a misstatement of the
 14 law. The parties have submitted competing instruction as to compensatory damages. Plaintiff's
 15 proposed instruction is based on pattern instructions from the Ninth Circuit and California, tracks
 16 this Court's instructions in *Planned Parenthood*, and fully informs the jury as to the issue to
 17 consider when awarding compensatory damages. *See* Ninth Cir. Model Civ. Instr. 5.1; CACI 3900;
 18 *Planned Parenthood Fed. of Am., Inc.*, No. 13-236, Doc. 1006 (N.D. Cal. Nov. 12, 2019), at 88 &
 19 90. Plaintiff's proposed "RICO-Causation" instruction adequately instructs that harm must be
 20 traced to "the predicate acts or ... the pattern of acts as a whole, or both."

21 The only case cited by Altria merely repeats the statutory requirement that the harm must
 22 have occurred "by reason of" the RICO violation. This is consistent with Plaintiff's contention that
 23 the key question is whether the fraudulent scheme damaged the Plaintiff, not whether certain
 24 component parts of the scheme injured the Plaintiff. *See In re JUUL*, 497 F. Supp. 3d at 618.

25 Altria's instruction, by focusing the jury on which predicate acts Plaintiff's conspiracy
 26 claim is "based on," is inconsistent with rule that, if Altria is found liable for RICO conspiracy, it
 27 is liable for all acts in furtherance of that conspiracy. *See Oki Semiconductor Co. v. Wells Fargo*
 28 *Bank*, 298 F.3d 768, 775 (9th Cir. 2002) ("If a RICO conspiracy is demonstrated, all conspirators

1 are liable for the acts of their co-conspirators.”); *In re JUUL*, 497 F. Supp. 3d at 623 n.44 (“Holding
2 RICO conspirators jointly and severally liable for the acts of their co-conspirators reflects the notion
3 that the damage wrought by the conspiracy ‘is not to be judged by dismembering it and viewing its
4 separate parts, but only by looking at it as a whole.’” (quoting *Oki Semiconductor*, 298 F.3d at 775).
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**[Contested, Altria-Proposed] RICO 18 U.S.C. § 1964(c) –
Assigning Responsibility for Damages**

ALTRIA’S PROPOSAL:

If you conclude that Plaintiff has proven that Altria violated RICO by conducting or participating in the conduct of an enterprise through a pattern of racketeering activity, you will need to determine the extent to which Altria’s RICO violation caused Plaintiff’s injury to business or property. Altria would be liable under 1962(c) only to the extent that it conducted or participated in conducting the racketeering activity that actually caused Plaintiff’s injury and would not be liable for harm caused by racketeering activity that it did not conduct or participate in conducting.

ALTRIA’S POSITION:

This instruction is consistent with Ninth Circuit case law. *See Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768 (9th Cir. 2002). In *Oki Semiconductor*, the defendant “acted as the Conspiracy’s financial mastermind and bookkeeper,” helping to launder the proceeds from computer chips stolen by the defendant’s conspirators. *Id.* at 773-74. The court, however, held that the plaintiff could not establish claims under 18 U.S.C. § 1962(c) against this defendant because the “direct and proximate cause of [plaintiff’s] loss was not [the defendant’s] money laundering at Wells Fargo; it was theft.” *Id.* at 774. Applied here, the result in *Oki Semiconductor* shows that Altria cannot be liable for injury to business or property caused by RICO violations that were part of schemes of misconduct that Altria was not involved in conducting.

The proposed instruction is needed to make this clear to the jury and to ensure that the jury applies the correct standard and focuses on the correct evidence. Without this instruction, the jury could erroneously conclude that Altria is liable for injury to business or property caused by schemes of racketeering activity that Altria never conducted or participated in conducting—a result that would be contrary to the law and extremely prejudicial.

Plaintiff’s response to Altria’s proposal asks the Court to adhere to the instruction given in the *Planned Parenthood* case. The questions of causation presented in this case are drastically different from, and far more complex, than those in *Planned Parenthood*. Both the alleged racketeering activity and the alleged injury to business or property are broader in scope and different

1 in kind in this case when compared to those in *Planned Parenthood*. Moreover, any purported
 2 connection between the alleged misconduct and Plaintiff's purported injuries are far more
 3 attenuated. Accordingly, Altria's different and more detailed instructions on RICO's causation
 4 requirement are necessary and appropriate here.

5 Plaintiff ignores the relevant portion of *Oki Semiconductor* that addressed causation for
 6 claims based on violations of section 1962(c) and instead cites dicta from that decision. Plaintiff's
 7 reliance on that decision fails to support its position and provides no reason why it does not support
 8 Altria's proposed instruction.

9 **PLAINTIFF'S POSITION:**

10 Plaintiff objects to this instruction as factually unsupported, and legally incorrect. The
 11 instruction is factually unsupported. The injury to SFUSD is existing and ongoing, caused by the
 12 entire RICO enterprise. Plaintiff is not seeking damages for a specific incident that occurred before
 13 Altria's involvement. Rather, Plaintiff is seeking damages for a course of conduct, by Altria and
 14 former defendants over several years, that resulted in damage to its business or property.

15 The instruction is also legally incorrect. The damages instructions proposed by Plaintiff are
 16 sufficient to inform the jury as to the requirements for awarding damages. *See* Ninth Cir. Model
 17 Civ. Instr. 5.1; CACI 3900; *Planned Parenthood Fed. of Am., Inc.*, No. 13-236, Doc. 1006 (N.D.
 18 Cal. Nov. 12, 2019), at 88 & 90. RICO liability is joint and several, so it is not necessary that the
 19 jury make individual determinations as to damages. *See, e.g., Dillon v. Graf*, No. 03-0119, 2007
 20 WL 9698269, at *6 (D. Nev. Sept. 12, 2007) (declaring defendants jointly and severally liable based
 21 on proven RICO violation). Further, Altria's citation to *Oki Semiconductor* does not aid their
 22 position. In that case, the Ninth Circuit held that "[i]f a RICO conspiracy is demonstrated, all
 23 conspirators are liable for the acts of their co-conspirators." *Oki Semiconductor Co. v. Wells Fargo*
 24 *Bank*, 298 F.3d 768, 775 (9th Cir. 2002). *See also In re JUUL*, 497 F. Supp. 3d at 623 n.44
 25 ("Holding RICO conspirators jointly and severally liable for the acts of their co-conspirators
 26 reflects the notion that the damage wrought by the conspiracy 'is not to be judged by dismembering
 27 it and viewing its separate parts, but only by looking at it as a whole.'" (quoting *Oki Semiconductor*,
 28 298 F.3d at 775).

1 This Court has rejected Defendants’ interpretation of *Oki Semiconductor* several times. *See,*
2 *e.g., In re JUUL Labs, Inc., Mktg. Sales Pracs. & Prod. Liab. Litig.*, No. 19-MD-02913-WHO,
3 2022 WL 2343268, at *19 (N.D. Cal. June 28, 2022) (“Under Ninth Circuit precedent, all
4 defendants who participated in the RICO enterprise are liable for the entire injury caused by the
5 enterprise’s illegal conduct, regardless of whether they personally participated in every aspect of
6 the conspiracy.”) (citing *Oki Semiconductor*, 298 F.3d at 775). *See also Marshall & Ilsley Tr. Co.*
7 *v. Pate*, 819 F.2d 806, 809 (7th Cir. 1987) (plaintiff need only establish “an injury directly resulting
8 from some or all of the activities comprising the [RICO] violation”).

**[Contested, Altria-Proposed] RICO 18 U.S.C. § 1964(c) –
Assigning Responsibility Based on Time of Involvement**

ALTRIA’S PROPOSAL:

If you conclude that Altria violated section 1962(c), then Altria would not be liable for harm caused by racketeering activity that took place before or after Altria was conducting or participating in the conduct of an enterprise through a pattern of racketeering activity.

ALTRIA’S POSITION:

This instruction is consistent with RICO decisions by the Ninth Circuit and other courts. *See, e.g., Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 775 (9th Cir. 2002); *McGowan v. Weinstein*, 562 F. Supp. 3d 744, 755 (C.D. Cal. 2021) (RICO defendants not liable for conduct that preceded involvement). In *Oki Semiconductor*, the defendant “acted as the Conspiracy’s financial mastermind and bookkeeper,” helping to launder the proceeds from computer chips stolen by the defendant’s conspirators. *Id.* at 773-74. The court, however, held that the plaintiff could not establish claims under 18 U.S.C. § 1962(c) against this defendant because the “direct and proximate cause of [plaintiff’s] loss was not [the defendant’s] money laundering at Wells Fargo; it was theft.” *Id.* at 774. Applied here, the result in *Oki Semiconductor* shows that Altria cannot be liable for injury to business or property caused by RICO violations committed before Altria conducted or participated in conducting the purported enterprise.

The proposed instruction is needed to make this clear to the jury and to ensure that the jury applies the correct standard and focuses on the correct evidence with respect to Altria. Without this instruction, the jury could erroneously conclude that Altria is liable for injury to business or property caused by schemes of racketeering activity that Altria could not have conducted or participated in conducting because they were undertaken before Altria engaged in that conduct—a result that would be contrary to the law and extremely prejudicial.

Plaintiff ignores the relevant portion of *Oki Semiconductor* that addressed causation for claims based on violations of section 1962(c) and instead cites dicta from that decision. Plaintiff’s reliance on that decision fails to support its position and provides no reason why it does not support Altria’s proposed instruction.

1 Plaintiff also asks the Court to adhere to the instruction given in the *Planned Parenthood*
 2 case. The claims, issues, allegations, and evidence in *Planned Parenthood* were different from
 3 those in this case. *See supra*. Accordingly, rather than simply adopting the instruction in *Planned*
 4 *Parenthood*, the Court should consider whether, given the claims and evidence in this case, the
 5 instruction proposed by Altria would better explain the issues to the jury and prevent confusion and
 6 prejudice. Altria's proposed instructions on causation would do so. The questions of causation
 7 presented in this case are drastically different from, and far more complex, than those in *Planned*
 8 *Parenthood*.

9 **PLAINTIFF'S POSITION:**

10 Plaintiff objects to this proposed instruction as legally incorrect and factually unsupported.

11 The instruction is factually unsupported. The injury to SFUSD is existing and ongoing,
 12 caused by the entire RICO enterprise. Plaintiff is not seeking damages for a specific incident that
 13 occurred before Altria's involvement. Rather, Plaintiff is seeking damages for a course of conduct,
 14 by Altria and former defendants over several years, that resulted in damage to its business or
 15 property.

16 This instruction is also legally incorrect. As discussed above, *Oki Semiconductor* does not
 17 support the concept of breaking out damages by individual RICO violator, as this Court has
 18 recognized. In that case, the Ninth Circuit held that "[i]f a RICO conspiracy is demonstrated, all
 19 conspirators are liable for the acts of their co-conspirators." *Oki Semiconductor Co. v. Wells Fargo*
 20 *Bank*, 298 F.3d 768, 775 (9th Cir. 2002). *See also In re JUUL*, 497 F. Supp. 3d at 623 n.44
 21 ("Holding RICO conspirators jointly and severally liable for the acts of their co-conspirators
 22 reflects the notion that the damage wrought by the conspiracy 'is not to be judged by dismembering
 23 it and viewing its separate parts, but only by looking at it as a whole.'" (quoting *Oki Semiconductor*,
 24 298 F.3d at 775). Further, the *McGowan* case was about whether acts that preceded a defendant's
 25 involvement could establish a pattern of racketeering activity—it was not about damages.
 26 *McGowan v. Weinstein*, 562 F. Supp. 3d 744, 755 (C.D. Cal. 2021).

**[Contested, Altria-Proposed] RICO – 18 U.S.C. § 1962(d) –
Conspiracy Damages Limited to Time of Altria’s Membership**

ALTRIA’S PROPOSAL:

If you conclude that Plaintiff has proven that Altria violated section 1962(d) by conspiring with another person to violate RICO and proven further the requirements of section 1964(c), you will need to determine the harm caused by racketeering activity taking place during the time that Altria was part of the conspiracy. Altria is not liable for damages caused by actions that took place before it joined or after it withdrew from the conspiracy.

ALTRIA’S POSITION:

Altria’s proposed instruction is supported by ample case law that holds that a RICO “co-conspirator is only liable for the overt acts committed after he joined the unlawful agreement.” *Mattel, Inc. v. MGA Ent., Inc.*, No. 04-CV-09049, 2010 WL 11463911, at *4 (C.D. Cal. Sept. 3, 2010); *see also, e.g., Bryant v. Mattel, Inc.*, No. 04-CV-09049, 2010 WL 3705668, at *14 (C.D. Cal. Aug. 2, 2010). As the Ninth Circuit has explained when addressing conspiracy liability, “a defendant cannot be held liable for substantive offenses committed before joining or after withdrawing from a conspiracy.” *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992); *see also, e.g., Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, No. 11-CV-02861, 2013 WL 2386635, at *6 (N.D. Cal. May 30, 2013) (similar); *McNeil v. Yale Univ.*, 436 F. Supp. 3d 489, 524 (D. Conn. 2020) (similar).

Altria’s proposed instruction is necessary here to ensure that the jury understands the limits upon RICO conspiracy liability and prevent the jury from imposing conspiracy liability for conduct that does not support that liability. The proposed instruction is especially critical here given that Plaintiff does not allege that Altria joined the purported conspiracy when it was formed. Plaintiff, for example, claims that the alleged conspiracy was formed and began to engage in racketeering activity that harmed Plaintiff long before Altria is alleged to have had any relationship with JLI. In the absence of Altria’s proposed instruction here, the jury is likely to think that Altria can be liable for racketeering activity undertaken before Altria joined any conspiracy. That understanding is contrary to the case law set forth above. Altria’s proposed instruction is necessary to avoid such

1 outcomes.

2 The court in *Oki Semiconductor* did not conclude that a defendant would be liable for a
 3 conspiracy's conduct from the time it was formed regardless of when that defendant joined the
 4 conspiracy. To the contrary, *Oki Semiconductor* addressed whether plaintiffs could amend to add
 5 a § 1962(d) conspiracy claim and concluded in *dicta* that they could not there based on *respondeat*
 6 *superior*. 298 F.3d at 776. *Smith v. United States*, 568 U.S. 106, 107 (2013), is a criminal case,
 7 but it supports the proposed instruction given its finding that withdrawal from the conspiracy cuts
 8 off liability for conspiracy.

9 **PLAINTIFF'S POSITION:**

10 Plaintiff objects to this proposed instruction as legally incorrect and factually unsupported.
 11 SFUSD's injury is current-existing and indivisible. There is no basis to divide the injury between
 12 conduct before Altria joined the conspiracy and conduct after. If Altria wants to prove it did not
 13 contribute to the injury at all, it may try to do so, but the existing instructions adequately instruct
 14 on that point.

15 The cited Eleventh Circuit model instruction does not support this proposition. *Oki*
 16 *Semiconductor* supports joint and several liability, not breaking out damages by time of
 17 participation. See *In re JUUL*, 497 F. Supp. 3d at 623 n.44 ("Holding RICO conspirators jointly
 18 and severally liable for the acts of their co-conspirators reflects the notion that the damage wrought
 19 by the conspiracy 'is not to be judged by dismembering it and viewing its separate parts, but only
 20 by looking at it as a whole.'" (quoting *Oki Semiconductor*, 298 F.3d at 775). Further, "[u]pon
 21 joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues
 22 until he withdraws." *Smith v. United States*, 568 U.S. 106, 107 (2013). Each conspirator becomes
 23 "responsible for the acts of his co-conspirators in pursuit of their common plot." *Id.* at 111. Thus,
 24 each conspirator is liable for the whole conspiracy unless and until that person withdraws. There is
 25 no evidence that Altria withdrew from the conspiracy.

1 **[Contested, Competing Proposals] Compensatory Damages**

2 **PLAINTIFF'S PROPOSAL:**

3 It is the duty of the Court to instruct you about the measure of damages. By instructing you
4 on damages, the Court does not mean to suggest for which party your verdict should be rendered.

5 If you find for the Plaintiff on either its negligence or RICO claims, you must determine
6 that Plaintiff's damages. For Plaintiff's nuisance claim, you will not make any determination on
7 damages.

8 Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages
9 means the amount of money that will reasonably and fairly compensate the Plaintiff for any injury
10 you find was caused by Altria. It is for you to determine what damages, if any, have been proved.
11 The Plaintiff does not have to prove the exact amount of damages that will provide reasonable
12 compensation for the harm. However, your award must be based on evidence and not on
13 speculation, guesswork, or conjecture.

14 **ALTRIA'S PROPOSAL:**

15 It is the duty of the Court to instruct you about the measure of damages. By instructing you
16 on damages, the Court does not mean to suggest for which party your verdict should be rendered.
17 To find for the Plaintiff on its negligence claim, you must find that Altria's conduct led directly to
18 the Plaintiff's harm. To find for the Plaintiff on its RICO claim, you must find that Plaintiff was
19 injured in its business or property by reason of racketeering activity that Altria conducted or
20 participated in conducting or which was conducted by a conspiracy that Altria had knowingly
21 agreed to join.

22 If you find for the Plaintiff on either its negligence or RICO claims, you must determine
23 Plaintiff's damages. For the nuisance claim, you will not make any determination on damages.
24 Instead, any remedy will be determined by the Court in a subsequent proceeding.

25 Plaintiff has the burden of proving damages. Damages means the amount of money that will
26 reasonably and fairly compensate the Plaintiff for any injury you find was caused by Altria. It is
27 for you to determine what damages, if any, have been proved. Your award must be based upon
28 evidence and not upon speculation, guesswork, or conjecture.

1 The amount of damages must include an award for each category of harm that was caused
 2 by Altria's wrongful conduct, even if the particular harm could not have been anticipated. The
 3 Plaintiff does not have to prove the exact amount of damages that will provide reasonable
 4 compensation for the harm. However, you must not speculate or guess in awarding damages. You
 5 may award Plaintiff damages to reimburse it for expenses that were directly caused by Altria's acts.
 6 Any damages based on money spent by the Plaintiff must have been for expenses that were
 7 reasonably incurred, or will be reasonably incurred, in light of Altria's actions.

8 **PLAINTIFF'S POSITION:**

9 Plaintiff's proposed instruction reflects a combination of Ninth Cir. Model Civ. Instr. 5.1
 10 and CACI 3900. There are two significant differences between the parties' proposed instruction.
 11 First, Defendants' instruction states the RICO requirement of injury to business or property. It is
 12 not necessary to repeat this requirement, as that issue is addressed in the RICO causation
 13 instruction. Second, Altria argues for the following language: "To find for the Plaintiff on its
 14 negligence claim, you must find that Altria's conduct led directly to the Plaintiff's harm." This does
 15 not reflect the applicable causation language from the California pattern instructions; even if it did,
 16 it would be redundant with those instructions. This is a damages instruction, not a causation
 17 instruction.

18 **ALTRIA'S POSITION:**

19 While the parties' proposed instructions are very similar, Altria's instruction includes
 20 important additional language that reminds the jury that it must make a liability finding specific to
 21 Altria and cannot make a general finding as to negligence for the purpose of awarding damages.
 22 *See Miller Family Tr. v. Nielsen*, 2012 WL 13227085, at *4 (C.D. Cal. July 31, 2012) ("Defendants'
 23 liability must be predicated upon their own conduct."); *Shanghai Automation Instrument Co. v.*
 24 *Kuei*, 194 F. Supp. 2d 995, 1009 (N.D. Cal. 2001) (individual defendant's liability turns on their
 25 own conduct and involvement in various alleged schemes). Without this language, the damages
 26 instruction as proposed by Plaintiff runs the risk that the jury may award damages based on
 27 generalized negligence rather than individualized findings. Further, the Plaintiff must show RICO
 28 causation directly related to the alleged pattern of RICO activity in order to recover damages.

1 Removing Altria's proposed additional language risks the jury awarding damages based on claims
2 of injury alone.

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No Punitive Damages⁴⁸

You must not include in your award any damages to punish or make an example of Altria. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate SFUSD for its loss.

⁴⁸ CACI 3924

Attorney Argument Not Evidence⁴⁹

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

⁴⁹ CACI 3925

Damages – Mitigation⁵⁰

Plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages. If you decide that Altria caused SFUSD harm, Plaintiff is not entitled to recover damages for harm that Altria proves by a preponderance of the evidence Plaintiff could have avoided with reasonable efforts or expenditures.

⁵⁰ Ninth Cir. Model Civ. Instr. 5.3

[Contested, Altria-Proposed] Mitigation – Reasonable Effort**ALTRIA’S PROPOSAL:**

When considering whether SFUSD mitigated its damages, you should consider the reasonableness of SFUSD’s efforts in light of the circumstances facing the school district at the time, including its ability to make the efforts or expenditures without undue risk or hardship and its efforts to obtain alternate, available sources of funding or other resources.

ALTRIA’S POSITION:

Altria’s proposed instruction is an accurate statement of the law. The instruction is a modified version of CACI 3931 that simplifies the model instruction and adapts it to the facts of this case. Altria will demonstrate that the Plaintiff failed to mitigate its damages. The jury must be instructed that they should consider the complete context of SFUSD when determining whether SFUSD mitigated its damages.

PLAINTIFF’S POSITION:

Plaintiff objects to this instruction as unnecessary. The pattern mitigation instruction captures the necessary elements of mitigation. Altria is welcome to argue that the Plaintiff should have done more to mitigate its damages, but should not be permitted to create a jury instruction to set up the factual foundation for its argument.

Alternatively, if the Court believes such an instruction is necessary, then it should give the actual CACI 3931, with its neutral language. It should not add specifics that reference Altria’s factual argument about the circumstances at the school district.

[Contested, Competing Proposals] Punitive Damages – Entitlement

PLAINTIFF’S PROPOSAL:

If you decide that Altria was negligent, you must decide whether that conduct justifies an award of punitive damages.

You may award punitive damages against Altria if Plaintiff proves that Altria acted with malice, oppression, or fraud. To do this, Plaintiff must prove one of the following by clear and convincing evidence:

1. That the conduct constituting malice, oppression, or fraud was conducted by one or more of Altria’s officers, directors, or managing agents, who acted on behalf of the entity Defendant; or

2. That the conduct constituting malice, oppression, or fraud was authorized by one or more of Altria’s officers, directors, or managing agents; or

3. That one or more of Altria’s officers, directors, or managing agents knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.

“Malice” means that Altria acted with intent to cause injury or that Altria’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his conduct and deliberately fails to avoid those consequences.

“Oppression” means that Altria’s conduct was despicable and subjected the Plaintiff to cruel and unjust hardship in knowing disregard of its rights.

“Fraud” means that Altria intentionally misrepresented or concealed a material fact and did so intending to harm Plaintiff.

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

ALTRIA’S PROPOSAL:

If you find for Plaintiff on its negligence claim you must decide whether that conduct justifies an award of punitive damages against Altria. You may award punitive damages against Altria only if you find by clear and convincing evidence that Altria’s conduct that harmed the Plaintiff was malicious, oppressive or in reckless disregard of the plaintiff’s rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff’s rights if, under the circumstances, it reflects complete indifference to the Plaintiff’s safety or rights, or if Altria acts in the face of a perceived risk that its actions will violate the plaintiff’s rights under state or federal law. An act or omission is oppressive if it injures or damages or otherwise violates the rights of the Plaintiff with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the Plaintiff.

PLAINTIFF’S POSITION:

Plaintiff’s proposed instruction is the entitlement portion of CACI 3945 (the instruction applicable to entity defendants). The pattern instruction is more complete than Altria’s instruction because it includes fraud, which is a basis for punitive damages under California law. *See* CACI 3947. The pattern instruction also helps the jury to understand how to navigate the punitive damages issue in a case that involves corporate defendants. Finally, Altria’s reliance on a federal pattern instruction does not make sense when the claim creating the possibility of punitive damages is a state-law claim.

ALTRIA’S POSITION:

Altria’s proposed instruction is closely modeled after the Ninth Circuit Model Jury Instructions 5.5 and is consistent with California law. Altria’s proposed instruction requires that Plaintiff prove Altria’s conduct is “malicious, oppressive or in reckless disregard of Plaintiff’s rights” in order to grant punitive damages. *See Pastora v. Cnty. of San Bernardino*, 2021 WL 8743941, at *7 (C.D. Cal. Dec. 22, 2021) (striking claim for punitive damages based on lack of facts that Defendants’ conduct was “malicious, oppressive or in reckless disregard of Plaintiff’s rights.”).

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[Contested, Competing Proposals] Punitive Damages – Amount

PLAINTIFF’S PROPOSAL:

If you decided that punitive damages are warranted, you must decide the amount, if any, that you should award the Plaintiff in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately in determining the amount:

- (a) How reprehensible was Altria’s conduct? In deciding how reprehensible Altria’s conduct was, you may consider, among other factors:
 1. Whether the conduct caused physical harm;
 2. Whether Altria disregarded the health or safety of others;
 3. Whether Plaintiff was financially weak or vulnerable and Altria knew Plaintiff was financially weak or vulnerable and took advantage of it;
 4. Whether Altria’s conduct involved a pattern or practice; and
 5. Whether Altria acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and Plaintiff’s harm?
- (c) In view of Altria’s financial condition, what amount is necessary to punish him or it and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources.

Punitive damages may not be used to punish Altria for the impact of its alleged misconduct on persons other than Plaintiff.

ALTRIA’S PROPOSAL:

If you decided that punitive damages are warranted, you must decide the amount, if any, that you should award the Plaintiff in punitive damages from Altria. There is no fixed formula for

determining the amount of punitive damages, and you are not required to award any punitive damages. If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice, or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of Altria's conduct, including whether the conduct that harmed the Plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish Altria for harm to anyone other than the plaintiff in this case.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on the Plaintiff.

PLAINTIFF'S POSITION:

Plaintiff's proposal is the amount portion of CACI 3945 (punitive damages for an entity defendant). This Court should give the pattern instruction, not Altria's manufactured instruction. The pattern instruction is also more helpful to the jury, in that it lays out specific factors that the jury should consider in awarding punitive damages. Further, punitive damages are determined under state law, where the underlying claim is a state-law claim. *See, e.g., Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). Thus, the Court should give the California pattern instruction, rather than blending in concepts from an inapplicable federal instruction.

ALTRIA'S POSITION:

Altria's proposed instruction includes language directly from both CACI 3942 and Ninth Circuit Model Civil Instruction 5.5. By including language from both pattern instructions, Altria's proposal best informs the jury of how they may determine a punitive damages award while mitigating certain risks that are not accounted for if either pattern instruction were to be used individually. For example, CACI 3942 does not warn the jury away from allowing "bias, prejudice, or sympathy" to impact their award. Further, the Ninth Circuit Model Civil Instruction 5.5 does not inform the jury that they "may impose punitive damages against one or more defendants and not

1 others and may award different amounts against different defendants.” By combining these
2 instructions, Altria proposes language that fairly and comprehensively instructs the jury.

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1 **[Contested, Altria-Proposed] Altria's Financial Condition**

2 **ALTRIA'S PROPOSAL:**

3 In determining the amount of punitive damages, if any, you may not increase the punitive
4 award above an amount that is otherwise appropriate merely because of Altria's wealth, size, or
5 financial condition.

6 **ALTRIA'S POSITION:**

7 Altria's proposed instruction is an accurate statement of California law that is important to
8 ensure the jury understands the bounds of punitive damages. CACI 3942 (modified) ("You may
9 not increase the punitive award above an amount that is otherwise appropriate merely because
10 [name of defendant] has substantial financial resources."). This instruction is also supported by
11 federal authority on punitive damages and necessary to avoid prejudice to Altria. *See, e.g., State*
12 *Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot
13 justify an otherwise unconstitutional punitive damages award."); *BMW of N. Am., Inc. v. Gore*, 517
14 U.S. 559, 591 (1996) (Breyer, J., concurring) (financial evidence "provides an open-ended basis
15 for inflating awards when the defendant is wealthy"); *Bains LLC v. Arco Prod. Co., Div. of Atl.*
16 *Richfield Co.*, 405 F.3d 764, 777 (9th Cir. 2005) ("The wealth of a defendant cannot justify an
17 otherwise unconstitutional punitive damages award," and "cannot make up for the failure of other
18 factors, such as "reprehensibility," to constrain significantly an award that purports to punish a
19 defendant's conduct.") (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427
20 (2003)). Altria's proposal to include this language is warranted here to mitigate the risk that a
21 punitive damages award is unconstitutionally "influenced by prejudice against large corporations."
22 *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 464 (1993). Moreover, this risk "is of special
23 concern when the defendant is a nonresident"—as Altria is in this action. *Id.*

24 **PLAINTIFF'S POSITION:**

25 Plaintiff objects to the instruction as duplicative, as this information is directly
26 communicated in the prior instruction. Plaintiff's proposed instruction states: "You may not
27 increase the punitive award above an amount that is otherwise appropriate merely because a
28 defendant has substantial financial resources." *See* CACI 3942.

1 **[Contested, Altria-Proposed] Limits (Punishment for Harm to Others)**

2 **ALTRIA’S PROPOSAL:**

3 In determining the amount of punitive damages, if any, you may not seek to punish Altria
4 for any harm suffered by any individuals other than Plaintiff.

5 **ALTRIA’S POSITION:**

6 Altria’s proposed instruction accurately reflects federal law that Altria may not be punished
7 for harm suffered by non-parties and the jury should not take into account harm to others in setting
8 the amount of punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423
9 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (holding that “the Constitution’s
10 Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury
11 that it inflicts upon nonparties”); *id.* at 423 (“Due process does not permit courts . . . to adjudicate
12 the merits of other parties’ hypothetical [punitive damage] claims against a defendant . . .”); *BMW*
13 *of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22
14 (1991); *White v. Ford Motor Co.*, 500 F.3d 963, 971-73 (9th Cir. 2007); *Burke v. Deere & Co.*, 6
15 F.3d 497, 511 (8th Cir. 1993); *see also Roundup/Hardeman* Phase 2 Instructions, 3:16-md-02741,
16 ECF 3212 (N.D. Cal. 3/27/2019) (“Punitive damages may not be used to punish Defendants for the
17 impact of their alleged misconduct on persons other than Plaintiff.”); June 21, 2018 Trial Tr. at
18 2838-39, *M Cohen v. R.J. Reynolds Tobacco Co.*, No. 14-18677 CA 23 (Fla. 11th Cir. Ct.); June
19 20, 2016 Trial Tr. at 2181-82, *Mooney v. R.J. Reynolds Tobacco Co.*, No. 11-40815 CA 01 (23)
20 (Fla. 11th Cir. Ct.); July 8, 2010 Trial Tr. at 2323-24, *Tate v. Philip Morris USA Inc.*, No. 2007-
21 CV-021723 (Fla. 17th Cir. Ct.) (giving substantially similar instruction); Mar. 23, 2010 Trial Tr. at
22 3120, *Cohen v. R.J. Reynolds Tobacco Co.*, No. 2007-CV 11515 (Fla. 17th Cir. Ct.) (same)
23 (collectively attached as Altria Ex. A).

24 **PLAINTIFF’S POSITION:**

25 The Court should not give this instruction, as it is duplicative. In the instruction on the
26 amount of damages, Plaintiff has included language informing the jury that they cannot punish
27 Altria for harm inflicted on non-parties. It is unnecessary to repeat that information in a separate
28 instruction. Specifically, Plaintiff’s proposal include this language: “Punitive damages may not be

1 used to punish Altria for the impact of his or its alleged misconduct on persons other than Plaintiff.”
2 CACI 3942.

3 Altria’s proposal is also confusing because it omits the information that the jury may
4 consider harm to others in determining the reprehensibility of Altria’s conduct. *Philip Morris USA*
5 *v. Williams*, 549 U.S. at 346, 353-55 (2007).
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[Contested, Altria-Proposed] Punishment Only for Conduct That Harmed Plaintiff

ALTRIA’S PROPOSAL:

In determining the amount of punitive damages against Altria, if any, you may punish Altria only for Altria’s own conduct as shown by clear and convincing evidence to have harmed Plaintiff.

ALTRIA’S POSITION:

Altria’s proposed instruction is an accurate statement of law that is necessary to prevent prejudice to Altria. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of the other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here.”); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (holding that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties”); *see also, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993); *see also* Oct. 17, 2018, Trial Tr. at 1832-1836, *In re: Engle Progeny Cases Tobacco Litig. (McFall Ridley)*, No. 50 2011 CA 005250 MB (Fla. 15th Cir. Ct.); Nov. 21, 2017 Trial Tr. at 2826-29, *In re: Engle Progeny Cases Tobacco Litig. (Adamson)*, No. 50 2016 CA 008532 MB (Fla. 15th Cir. Ct.) (giving similar instruction); Feb. 13, 2018 Trial Tr. at 1764, *In re: Engle Progeny Cases Tobacco Litig. (Hardin)*, No. 12-29000-CA (31) (Fla. 11th Cir. Ct.); Feb. 20, 2014 Trial Tr. at 2842-44, *In re: Engle Progeny Cases Tobacco Litig. (Wendel)*, No. 10-54813-CA-15 (collectively attached as Altria Ex. A).

PLAINTIFF’S POSITION:

This proposed instruction is duplicative. The pattern instruction for determining the amount of punitive damages makes clear that punitive damages are to be considered with reference to Altria’s conduct specifically. Plaintiff’s proposed instruction on the amount of punitive damages directs the jury not to award damages based on harm to anyone other than the Plaintiff, based on *Williams*.

1 Thus, the jury already has been instructed to award punitive damages based on Altria's
2 actions and only based on harm to this Plaintiff. An additional instruction saying those same things
3 is unnecessary and likely would confuse the jury.

1 **[Contested, Altria-Proposed] Greater Award Than Necessary**

2 **ALTRIA’S PROPOSAL:**

3 If you decide to impose some amount of punitive damages against Altria, the award should
4 be no greater than the amount that you find necessary to punish Altria for the conduct by Altria
5 giving rise to this Plaintiff’s cause of action and to deter Altria from engaging in such unlawful
6 conduct in the future.

7 **ALTRIA’S POSITION:**

8 Altria’s proposed instruction is an accurate statement of law that is necessary to prevent
9 prejudice to Altria. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (“While
10 we do not suggest there was error in awarding punitive damages based upon State Farm’s conduct
11 toward the Campbells, a more modest punishment for this reprehensible conduct could have
12 satisfied the State’s legitimate objectives, and the Utah court should have gone no further.”); *Pac.*
13 *Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving standards that allow determination
14 of “whether a particular award is greater than reasonably necessary to punish and deter”).

15 **PLAINTIFF’S POSITION:**

16 Plaintiff objects to this instruction because it is duplicative. The pattern instruction on the
17 amount of punitive damages explains the jury’s role, stating: “You must now decide the amount,
18 if any, that you should award the Plaintiff in punitive damages. The purposes of punitive damages
19 are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar
20 conduct in the future.” CACI 3942. The instruction then tells the jury the factors they should
21 consider in making this determination. *Id.*

22 The cases cited by Altria discuss standards to be applied by a court in reviewing an award,
23 not information to be given to a jury. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.
24 408, 419 (2003) (holding that court went too far in punishing conduct that impacted other states);
25 *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving Alabama’s standards for
26 assessing punitive damages awards). Altria offers no support for instructing the jury in this manner.

1 **[Contested, Altria-Proposed] Compliance with Federal or State Law**

2 **ALTRIA’S PROPOSAL:**

3 In determining the amount of punitive damages, if any, you may not seek to punish Altria
4 for any conduct that complied with federal or state law, was authorized by federal or state law, or
5 was otherwise lawful where it occurred.

6 **ALTRIA’S POSITION:**

7 Altria’s proposed instruction accurately states the law. The Supreme Court has held that a
8 “State cannot punish a defendant for conduct that may have been lawful where it occurred A
9 jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish
10 a defendant for action that was lawful in the jurisdiction where it occurred.” *State Farm Mut. Auto.*
11 *Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003); *see also id.* at 423 (“Due process does not
12 permit courts, in the calculation of punitive damages, to adjudicate the merits of the other parties’
13 hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have
14 no doubt the Utah Supreme Court did that here.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559,
15 572-73 (1996) (“[N]either the jury nor the trial court was presented with evidence that any of
16 BMW’s out-of-state conduct was unlawful.”); *see also* Nov. 1, 2016 Trial Tr. at 2174-75, *Ledo v.*
17 *R.J. Reynolds Tobacco Co.*, No. 08-00113-CA-31 (Fla. 11 Cir. Ct.) (“The warning labels placed on
18 cigarette packs and advertisements by RJ Reynolds and other tobacco companies complied with
19 federal law, and after July 1, 1969, RJ Reynolds had no obligation to place additional warnings on
20 their cigarette packages and advertisements. As long as the cigarette packs bear the federally
21 mandated warnings, cigarette advertising after July 1, 1969, cannot be the subject of any claim that
22 the advertising undermined or neutralized the warnings or made them less effective.”) (Altria Ex.
23 A).

24 **PLAINTIFF’S POSITION:**

25 Plaintiff objects to this instruction as overly confusing because it adds nothing. The
26 instruction essentially says that the jury cannot punish Altria for lawful conduct. The jury has
27 already been told, in prior instructions, that it may only punish Altria for conduct that supported an
28 award of compensatory damages—i.e., unlawful conduct. Therefore, the proposed instruction is

1 unnecessary and confusing. The pattern instruction gives the jury all of the information that it needs
2 to determine the amount of punitive damages under California law. *See* CACI 3942. Further, the
3 comment in *State Farm* that a jury may not punish conduct that is lawful in another state is
4 inapplicable here. *See State Farm*, 538 U.S. at 422. The test for negligence is essentially the same
5 in every jurisdiction. *See, e.g.*, Restatement (2nd) Torts § 282 (defining negligence). Thus, if the
6 jury finds that Altria was negligent, then it is inherently determining that the conduct was unlawful,
7 wherever it may have occurred.

1 **[Contested, Altria-Proposed] Conduct By Anyone Other Than Altria**

2 **ALTRIA'S PROPOSAL:**

3 In determining the amount of punitive damages, if any, to be awarded against Altria you
4 may not consider conduct committed by anyone other than Altria.

5 **ALTRIA'S POSITION:**

6 This instruction accurately states the law. *See, e.g., State Farm Mut. Auto. Ins. Co. v.*
7 *Campbell*, 538 U.S. 408, 423 (2003); *see also* Mar. 23, 2010 Trial Tr. at 3120, *Cohen v. R.J.*
8 *Reynolds Tobacco Co.*, (Fla. 17th Cir. Ct.); Final Jury Instr. at 7, *Mooney v. R.J. Reynolds Tobacco*
9 *Co.*, (Fla. 11th Cir. Ct.) (collectively attached as Altria Ex. A).

10 **PLAINTIFF'S POSITION:**

11 This instruction is duplicative and unnecessary. Plaintiff's proposed pattern instructions on
12 entitlement to punitive damages and amount of punitive damages give the jury all of the necessary
13 information. *See* CACI 3942.

14 Altria's citation to *State Farm* does not support the stated proposition. *State Farm* was
15 addressing the point that the defendant could only be punished for conduct directed toward that
16 plaintiff. *State Farm*, 538 U.S. at 423. The cited page does not address the issue of punishing one
17 defendant for the conduct of another. Altria's other citations are to Florida law and inapplicable
18 here. The pattern instruction directs the jury to consider Altria's conduct. No further instruction is
19 necessary.

1 **[Contested, Altria-Proposed] Reasonable Relationship**

2 **ALTRIA’S PROPOSAL:**

3 There must be a reasonable relationship between any amount of punitive damages you
4 award and the amount of compensatory damages you have awarded.

5 **ALTRIA’S POSITION:**

6 This instruction accurately states the law. *See, e.g., BMW of North America v. Gore*, 517
7 U.S. 559, 580-83 (1996) (“The principle that exemplary damages must bear a ‘reasonable
8 relationship’ to compensatory damages has a long pedigree. . . . Our [prior decisions] endorsed the
9 proposition that a comparison between the compensatory award and the punitive award is
10 significant.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Exxon*
11 *Shipping Co. v. Baker*, 554 U.S. 471, 503 (2008); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509
12 U.S. 443, 459 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 21 (1991); *see also, e.g.,* May
13 30, 2012 Trial Tr. at 9050-51, *In Re Engle Progeny Cases Tobacco Litig. (Calloway)*, No. 08-
14 021770 (Fla. 17th Cir. Ct.) (giving substantially similar instruction); Mar. 23, 2015 Trial Tr. at
15 4287, *In Re: Engle Progeny Cases Tobacco Litig. (Pollari)*, No. 14-001563 CA 19 (Fla. 17th Cir.
16 Ct.) (same); Sept. 30, 2013 Trial Tr. at 2596, *Crawford v. R.J. Reynolds Tobacco Co.*, No. 11-14352
17 CA 20 (Fla. 11th Cir. Ct.) (same); Aug. 29, 2014 Trial Tr. at 4826-27, *Hubbird v. R.J. Reynolds*
18 *Tobacco Co.*, No. 12-18904 CA 42 (Fla. 11th. Cir. Ct.) (same); Apr. 21, 2015 Trial Tr. at 2627, *In*
19 *Re: Engle Progeny Cases Tobacco Litig. (Ryan)*, No. 08-022579 (19) (Fla. 17th Cir. Ct.) (same)
20 (collectively attached as Altria Ex. A). This instruction also is permissible in this Circuit. *See, e.g.,*
21 *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007) (“[S]tates are certainly free to
22 incorporate the reasonable relationship concept into jury instructions, . . . it is also constitutionally
23 permissible for a district court to delay the reasonable relationship inquiry until the judge’s post-
24 verdict review.”). The instruction is appropriate here because it would give the jury guidance
25 concerning the amount of any punitive damages award.

26 **PLAINTIFF’S POSITION:**

27 This instruction should not be given. Altria’s proposal is a rule of law applied by the Court
28 on review of a punitive damages award, not a fact issue to be given to the jury. *See, e.g., State*

1 *Farm*, 538 U.S. at 426 (“In sum, courts must ensure that the measure of punishment is both
2 reasonable and proportionate to the amount of harm to the plaintiff and to the general damages
3 recovered.”).

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1 **[Contested, Altria-Proposed] Mitigating Evidence**

2 **ALTRIA'S PROPOSAL:**

3 In determining the amount of punitive damages, if any, you should take into consideration
4 any mitigating evidence. Mitigating evidence is evidence that may demonstrate that there is no need
5 for punitive damages or that a reduced amount of punitive damages should be imposed against
6 Altria.

7 **ALTRIA'S POSITION:**

8 This instruction accurately states the law. *See, e.g., TXO v. Alliance Res. Corp.*, 509 U.S.
9 443, 464 (1993) (mitigating circumstances should be considered in determining whether to award
10 punitive damages); *Hardeman v. Monsanto Co.*, 997 F.3d 941, 974 (9th Cir. 2021) (taking into
11 account "mitigating considerations" in reviewing punitive damages award); *Lance Prods., Inc. v.*
12 *Com. Union Bank*, 764 S.W.2d 207, 214 (Tenn. Ct. App. 1988) (punitive damages award
13 considered mitigating evidence); *see also* Sept. 24, 2018 Trial Tr. at 2711, *Chadwell v. Philip*
14 *Morris USA Inc.*, No. 10-17931 CA 59 (Fla. 11th Cir. Ct.) (giving similar instruction); July 18,
15 2016 Trial Tr. at 4774-75, *In Re: Engle Progeny Cases Tobacco Litig. (Varner)*, No. 08-026345
16 (Fla. 17th Cir. Ct.) (same); Apr. 19, 2016 Trial Tr. at 2851, *In Re: Engle Progeny Cases Tobacco*
17 *Litig. (V Turner)*, No. 2008-CV-019616 (19) (Fla. 17th Cir. Ct.) (same); Mar. 1, 2016 Trial Tr. at
18 3551, *In Re: Engle Progeny Cases Tobacco Litig. (McCall)*, No. 2007-CV-36888 (19) (Fla. 17th
19 Cir. Ct.) (same) (collectively attached as Altria Ex. A). The instruction is appropriate here because
20 it would give the jury guidance concerning the amount of any punitive damages award and the
21 appropriate basis for such an award.

22 **PLAINTIFF'S POSITION:**

23 Plaintiff objects to this instruction as confusing and unnecessary in light of previous
24 instructions. The California pattern instruction gives specific information as to what the jury should
25 consider when awarding punitive damages. CACI 3942.

26 The first case cited by Altria does nothing more than recite a jury instruction in a footnote
27 that happened to mention mitigation. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 463 n.29
28 (1993). The case arose under West Virginia law. *Id.* at 447. The cited Ninth Circuit decision merely

1 considered mitigating circumstances in evaluating a district court's punitive award. *Hardeman v.*
2 *Monsanto Co.*, 997 F.3d 941, 974 (9th Cir. 2021). Nothing in *Hardeman* suggests that the jury
3 should be instructed on mitigation. Altria's remaining cases are all Florida cases that have no
4 applicability here.

5 This Court should apply the California pattern instruction.
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1 **[Contested, Altria-Proposed] Mitigating Evidence – RICO treble damages**

2 **ALTRIA’S PROPOSAL:**

3 In determining the amount of punitive damages, if any, one mitigating factor you should
4 consider is that the RICO award of damages against Altria will be automatically trebled pursuant
5 to the RICO statute. This means that Plaintiff would be awarded three times the amount of any
6 damages you award under RICO even without an award of punitive damages.

7 **ALTRIA’S POSITION:**

8 Altria’s proposed instruction does not instruct the jury that punitive damages are
9 unavailable because of an award of treble damages (although Altria preserves its arguments on this
10 point⁵¹). Instead, the proposed instruction would inform the jury that Altria already must pay triple
11 the amount of compensatory damages awarded under RICO to the Plaintiff before the jury decides
12 the amount of any punitive damages. This instruction is consistent with and supported by RICO
13 case law and authority governing punitive damages, and is necessary to ensure that the jury does
14 not award punitive damages in an amount exceeding legal and constitutional limits.

15 “Treble damages under RICO are primarily punitive in nature.” *Davis v. Standefor*, 2009
16 WL 10672743, at *1 (C.D. Cal. 2009); *see also, e.g., Southwest v. Triple A Machine Shop, Inc.*,
17 720 F. Supp. 805, 810 (N.D. Cal. 1989) (“The civil remedy provision of RICO, 18 U.S.C. § 1964,
18 provides for treble damages which are themselves punitive in character.”); *Rose v. Abraham*, 2012
19 WL 78204, at *7 (E.D. Cal. 2012) (“[T]he treble damages under RICO are both remedial and
20 punitive in nature . . .”). Accordingly, if the jury finds in favor of Plaintiff on the RICO claims,
21 the trebled damages awarded under that statute would already serve, in whole or in part, the purpose
22 of punitive damages. The jury should be informed of that before it determines the amount, if any,
23 of additional punitive damages that might be appropriate. Indeed, without this instruction, there is
24 a significant risk that the jury’s award would punish Altria twice for the exact same conduct and
25 thereby be excessive and improper. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22

26 ⁵¹ In particular, Altria preserves its argument that Plaintiff should not be permitted to recover both
27 treble damages and punitive damages for the same conduct. Given the Court’s prior ruling on this
28 subject in *Planned Parenthood*, 480 F. Supp. 3d 1000 (N.D. Cal. 2020), and the Ninth Circuit’s
statements in *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123 (9th Cir. 1997), Altria submits this
instruction in the event the Courts reject that position.

(1991) (punitive damages should not be “greater than reasonably necessary to punish and deter”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (“While we do not suggest there was error in awarding punitive damages based upon State Farm’s conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah court should have gone no further.”). Moreover, such an award would be improper because it would not “bear a ‘reasonable relationship’ to compensatory damages.” *BMW of North America v. Gore*, 517 U.S. 559, 580-83 (1996) (citation omitted); *see also, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 503 (2008); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 21 (1991).

PLAINTIFF’S POSITION:

Plaintiff objects to this instruction as unsupported by law. Altria does not cite a single case instructing the jury to considering RICO treble damages are part of it determination of punitive damages on a state-law claim. Under RICO, the jury has nothing to do with trebling of damages; that is a matter for the Court. *See, e.g., Allstate Ins. Co. v. Nassiri*, No. 08-369, 2013 WL 3716444, at *1 (D. Nev. July 15, 2013) (jury awarded compensatory damages, then court determined trebling). If treble damages are relevant to the Court’s due process proportionality analysis, then Altria can make this argument at the appropriate time.

Duty to Deliberate⁵²

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

⁵² Ninth Cir. Model Civil Instr. 3.1

Consideration of Evidence – Conduct of the Jury⁵³

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, computer, or any other means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, TikTok, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. You must disable “push notifications” from any news, media, or social media source on your phone. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party’s right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside

⁵³ Ninth Cir. Model Civil Instr. 3.2 (modified)

1 the courtroom, or gain any information through improper communications, then your verdict may
2 be influenced by inaccurate, incomplete or misleading information that has not been tested by the
3 trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the
4 case based on information not presented in court, you will have denied the parties a fair trial.
5 Remember, you have taken an oath to follow the rules, and it is very important that you follow
6 these rules.

7 A juror who violates these restrictions jeopardizes the fairness of these proceedings. If any
8 juror is exposed to any outside information, please notify the court immediately.

Communication with the Court⁵⁴

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk, signed by any one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing, or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

⁵⁴ Ninth Cir. Model Civil Instr. 3.3

Return of Verdict⁵⁵

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.

⁵⁵ Ninth Cir. Model Civil Instr. 3.5

IN-TRIAL INSTRUCTIONS

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Video Deposition⁵⁶

You will now be shown the video-recorded testimony of [witness] taken [date of deposition]. It will be obvious to you that the video has been edited. Edits were made both to shorten the video and to comply with my earlier out-of-court rulings on specific objections or issues raised during the testimony. You should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

⁵⁶ Ninth Cir. Model Civil Instr. 2.4 (modified)

Video Corporate Representative Deposition

You will now be shown the video-recorded testimony of [Defendant] through its designated corporate representative, [name of witness], taken [date of deposition]. The testimony is given through a corporate representative and should be considered by you as testimony of [Defendant corporation] itself. It will be obvious to you that the video has been edited. Edits were made both to shorten the video and to comply with my earlier out-of-court rulings on specific objections or issues raised during the testimony. You should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

Use of Interrogatories⁵⁷

Evidence [will now be] [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

⁵⁷ Ninth Cir. Model Civil Instr. 2.11

Expert Work on Multiple Cases

You have heard an expert or experts testify as to the amount of money they have been paid for their work in this litigation. It is important for you to know that this trial is part of a larger Multi District Litigation (MDL) proceeding. An MDL involves a number of similar cases filed in different parts of the country. All of the similar cases are consolidated and transferred to one court and one judge for handling. These cases were consolidated for purposes of the MDL for reasons of efficiency only because they share certain facts in common, including some common expert witnesses.

ALTRIA EXHIBIT A

Page 9041

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

COMPLEX CIVIL DIVISION
Case No. 08-80000 (21)
JUDGE JOHN J. MURPHY, III

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Pertains to: Marvinne Calloway
Case No. 08-021770

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
VOLUME 67
PAGES 9041 - 9115

DATE TAKEN: May 30, 2012
TIME: 4:26 p.m. - 5:40 p.m.
PLACE: Broward County Courthouse
201 S.E. 6th Street
Fort Lauderdale, Florida 33301
BEFORE: JOHN J. MURPHY, III, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were reported by:

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<p>1 about which the witness testified, the ability 2 of the witness to remember the matters about 3 which the witness testified, and the 4 reasonableness of the testimony of the witness, 5 considered in the light of all the evidence in 6 the case and in light of your own experience 7 and common sense.</p> <p>8 You may also consider harms suffered by 9 other persons not parties to this lawsuit in 10 assessing the reprehensibility or wrongfulness 11 of defendants' acts, but you may not impose 12 punitive damages to punish defendants for harms 13 caused to others.</p> <p>14 If you determine that punitive damages 15 should be awarded, the amount of damages must 16 be based only on harm suffered by Mr. Calloway, 17 Mrs. Calloway, or Ms. Williams.</p> <p>18 You are to decide the amount of punitive 19 damages, if any, to be assessed as punishment 20 and as a deterrent to others. This amount 21 would be in addition to the compensatory 22 damages you have previously awarded.</p> <p>23 In making this determination, you should 24 consider the following: 1, the nature, extent 25 and degree of misconduct and related</p>	<p>1 compensatory damages you have awarded to the 2 plaintiff.</p> <p>3 The fact that defendants are corporations 4 must not prejudice you in your deliberations or 5 in your verdict. You may not discriminate 6 between corporations and natural individuals. 7 Both are persons in the eyes of the law, and 8 both are entitled to the same fair and 9 impartial consideration by the same legal 10 standard.</p> <p>11 You may not allow your decision regarding 12 the amount of punitive damages to be affected 13 by the fact that defendant's principle 14 corporate office is outside the state of 15 Florida.</p> <p>16 Defendants have a right to defend 17 themselves in litigation. You may not impose 18 punitive damages based on defendant's defense 19 of this case.</p> <p>20 That is the law that you must follow in 21 deciding this third phase of the case. The 22 attorneys for the parties will now present 23 their final arguments. When they are through, 24 I will have a few final instructions about your 25 deliberations.</p>
Page 9050	Page 9052
<p>1 circumstances; 2, each defendant's financial 2 resources; and 3, whether there is a continuing 3 need for deterrence in light of any changes in 4 the conduct of the defendant from the conduct 5 on which you based your determination that 6 punitive damages were warranted.</p> <p>7 However, you may not award an amount that 8 would financially destroy any defendant.</p> <p>9 You may in your discretion decline to 10 assess punitive damages. You may assess 11 punitive damages against one defendant and not 12 the others, or against more than one defendant. 13 Punitive damages maybe assessed against 14 different defendants in different amounts.</p> <p>15 You should impose punitive damages only 16 if you conclude that monetary liability beyond 17 your award of compensatory damages is necessary 18 to accomplish punishment and deterrence.</p> <p>19 In determining the amount of punitive 20 damages, if any, you may only punish a 21 defendant for conduct to the extent it produced 22 harms or had an effect within the state of 23 Florida. There must be some reasonable 24 relationship between any amount of punitive 25 damages you award and the amount of</p>	<p>1 Members of the jury, just remember that 2 you have now heard all the evidence in the 3 case. The attorneys now will present their 4 final arguments. What the attorneys say is not 5 evidence. The arguments are a final 6 opportunity for the attorneys to discuss the 7 case and to persuade you to reach a verdict in 8 favor of their client.</p> <p>9 Each side has equal time, but the 10 plaintiffs attorney will go first, followed by 11 defense counsel. Finally, the plaintiff's 12 attorney may make a rebuttal argument. Please 13 give the attorneys your close attention.</p> <p>14 Counsel?</p> <p>15 MR. HAMMER: Thank you, Judge.</p> <p>16 We're here today, today, about 17 punishment, punishing these companies.</p> <p>18 For two months, basically, you sat here 19 and you heard evidence about what they have 20 done and how it impacted Marvine and Starr and 21 how it killed Johnnie Calloway. We're here to 22 punish them for that conduct.</p> <p>23 Your award, your compensatory damage 24 award, which included the pain and suffering, 25 which included the support and services, that</p>

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
COMPLEX CIVIL DIVISION
Case No. 08-80000 (19)
JUDGE JOHN J. MURPHY, III

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Pertains To: ROSE POLLARI, as Personal
Representative of the Estate of PAUL J. POLLARI
Case No.: 14-001563 CA 19

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
Volume 32, Pages 4254 - 4363

DATE TAKEN: March 23rd, 2015
TIME: (2:00) 1:57 p.m. - 4:28 p.m.
PLACE: Broward County Courthouse
201 S.E. 6th Street
Fort Lauderdale, Florida 33301
BEFORE: John J. Murphy, III, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were reported by:

Tracey S. LoCastro, RPR, FPR, CLR
United Reporting, Inc.
1218 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
954-525-2221

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1 lung cancer and death and that was the basis for
2 your finding that the defendants are liable to
3 plaintiff on her claims involving fraudulent
4 concealment and/or conspiracy to fraudulently
5 conceal. You may not consider the conduct
6 underlying plaintiff's claims for strict
7 liability or negligence.

8 In making this determination you should
9 consider the following:

10 1. The nature, extent and degree of
11 misconduct and the related circumstances.

12 2. The financial resources of the
13 defendants.

14 3. Whether there is a continuing need for
15 deterrence in light of any changes in the
16 conduct of the defendant from the conduct on
17 which you based your determination that punitive
18 damages were warranted.

19 4. Any other circumstances relevant in
20 determining the amount of punitive damages.

21 You may in your discretion decline to assess
22 punitive damages. You may assess punitive
23 damages against one, both or neither defendants.
24 Punitive damages may be assessed against each
25 defendant in different amounts.

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1 You should impose punitive damages only if
2 you conclude that monetary liability beyond your
3 award of compensatory damages is necessary to
4 accomplish punishment and deterrence. You
5 should not award punitive damages if you
6 conclude that those purposes will be satisfied
7 by a defendant's compensatory liability.

8 When determining the amount, if any, of
9 punitive damages to be awarded you may not
10 impose punitive damages to punish a defendant
11 for acts that did not cause Mr. Pollari's lung
12 cancer and/or death.

13 Nor may you consider evidence of conduct
14 that has no nexus to the conduct that caused
15 Mr. Pollari's lung cancer and/or death. You may
16 punish a defendant only for injury caused to
17 Mr. Pollari by the specific conduct of that
18 defendant that was the basis of your finding
19 that punitive damages may be warranted against
20 that defendant.

21 In deciding whether punitive damages are
22 warranted, you may not seek to punish the
23 defendants for any harm suffered by any
24 individual other than Paul Pollari nor may you
25 punish the defendants for conduct that did not

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1 produce harms within the state of Florida.

2 However, you may consider harms suffered by
3 other persons not parties to this lawsuit in
4 assessing the reprehensibility or wrongfulness
5 of the defendants' acts.

6 If you decide to award punitive damages
7 against a defendant, the award should be no
8 greater than the amount that you find necessary
9 to punish that defendant for its intentional
10 misconduct that caused Mr. Pollari's lung cancer
11 and/or death and to deter that defendant and
12 others from engaging in such misconduct in the
13 future.

14 Your consideration of whether punitive
15 damages are warranted for a defendants' conduct
16 must be based on the same or similar conduct
17 which has been shown by clear and convincing
18 evidence to have caused Paul Pollari's lung
19 cancer and/or death.

20 In determining whether punitive damages are
21 warranted you may also take into consideration
22 any mitigating evidence. Mitigating evidence is
23 the evidence which may demonstrate there is no
24 need to impose punitive damages or that a
25 reduced amount of punitive damages should be

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1 imposed against the defendants.

2 In determining the amount of punitive
3 damages, if any, you may not punish either
4 defendant for any conduct that complied with
5 federal or state law, was authorized by federal
6 or state law, or was otherwise lawful where it
7 occurred.

8 The manufacture and sale of cigarettes is a
9 lawful activity protected by federal law.
10 Therefore, you may not impose punitive damages
11 to punish a defendant for simply manufacturing,
12 selling or advertising cigarettes, even if that
13 defendant knew or believed them to be dangerous
14 or to present health risks.

15 In determining the amount of punitive
16 damages, if any, to assess against a defendant
17 you should consider the extent to which the
18 defendants' conduct has changed from the conduct
19 on which you based your determination that
20 punitive damages may be warranted and the extent
21 to which the circumstances have changed. You
22 are entitled to conclude that misconduct that
23 occurred in the distant past and involved actors
24 who are no longer associated with the defendant
25 need not be punished or that it should be

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1 punished less severely than recent misconduct.

2 Finally, any amount of punitive damages you
3 award must bear a reasonable relationship to the
4 amount of compensatory damages which you have
5 awarded to the plaintiff. Your verdict on the
6 issues raised by punitive damages claim of Rose
7 Pollari as personal representative of the estate
8 of Paul Pollari against RJ Reynolds Tobacco
9 Company and Philip Morris USA Inc. must be based
10 on the evidence that has been received during
11 the trial of the first phase of this case and on
12 the evidence that has been received in these
13 proceedings and the law which I have instructed
14 you.

15 Ladies and gentlemen, the attorneys will now
16 present their opening statements.

17 Mr. McPharlin.

18 MR. MCPHARLIN: Yes, sir, thank you.

19 Afternoon, ladies and gentlemen.

20 This part of the trial is going to move
21 pretty quick. But because of how fast it moves,
22 don't let that influence you on how important it
23 is.

24 We've spent a lot of time talking with you
25 guys about things that Philip Morris has done

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1 punishing them not only punishes them for their
2 conduct, deters them from doing it again and may
3 deter other companies from acting just as badly
4 or even remotely as badly as Philip Morris and
5 RJ Reynolds has in this case.

6 So in making the decisions that you have to
7 make, the judge gave you those instructions, and
8 they're much shorter this time.

9 So I want to talk about a couple of the
10 things that he told you just so that you
11 understand what this part of the trial is about,
12 the nature, the extent and the degree of the
13 misconduct.

14 You've already considered whether they
15 should be punished. You've already considered
16 whether punitive damages are appropriate. And
17 that decision was made based on a standard that
18 we had to meet that was much higher than the
19 other standard that we had that you were to
20 decide all the other issues in the case. So by
21 clear and convincing evidence you collectively
22 came to the decision that these companies should
23 be punished for what they did. This part of the
24 trial is to determine if they will be punished.
25 And the law says that you do not have to award

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1 and things that RJ Reynolds has done,
2 educating -- we hope educating you on a long
3 history of conduct that these companies have
4 engaged in over decades. So that took us time,
5 and we've spent a lot of time doing that, and we
6 don't need to do that again. So this part of
7 the trial is going to move very fast.

8 And what we've -- what you've accomplished
9 so far is incredibly important. What you have
10 yet to accomplish is also extremely important.

11 You have not had the opportunity to consider
12 amongst yourselves if these companies should be
13 punished for what they did. If what they did
14 for all of the time that we've covered in this
15 case, all of the different things that you've
16 seen, if that's okay, if that is something that
17 a company should be punished for, a company
18 should be deterred from doing again and other
19 companies should be deterred from doing.
20 Because punitive damages in the state of Florida
21 is not just about punishing the company that
22 behaves badly. You're going to see, and the
23 judge has already read them to you, the
24 instructions the law in Florida is that when a
25 company behaves the way that they have,

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1 money in this part of the trial, but we believe
2 based on the evidence that you've seen that --
3 and that you've already seen, a reasoned
4 judgment is that what they did is well deserving
5 of punishment.

6 Companies cannot behave that way. They
7 cannot put human life over profits.

8 MS. HENNINGER: Objection to the argument.

9 THE COURT: Sustained.

10 MR. MCPHARLIN: The evidence will be that
11 that's what they did. And you will see that
12 further in this part of the trial, that they put
13 human life over profits and they need to be
14 punished for that.

15 You'll also consider their financial
16 resources. Remember, they're a business and
17 they have a business model that we have talked
18 about at length for a couple of weeks now, and
19 that business model has enabled them to rise
20 financially to the level where they are at.

21 And what is that business model based on?
22 As we showed you in the first part of the trial,
23 it's based on acquiring as many young people as
24 they can. It's still based on that. Today over
25 90 percent of their regular daily customers

1 IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
2 IN AND FOR MIAMI-DADE COUNTY, FLORIDA

3 CASE No.11-14352 CA 20

4
5 WILLIAM CRAWFORD,
6 Plaintiff,

7 -vs-

8 R.J. REYNOLDS TOBACCO COMPANY, individually
9 and as successor by merger to BROWN & WILLIAMSON
10 U.S.A. INCORPORATED and/or BROWN & WILLIAMSON
11 TOBACCO CORPORATION, individually and as successor
12 by merger to THE AMERICAN TOBACCO COMPANY, a
13 foreign corporation, et al.,
14 Defendants.

15 TRIAL BEFORE THE HONORABLE
16 RONALD DRESNICK

17 Vol XXI

18
19 Monday, September 30, 2013
20 Dade County Courthouse
21 Miami, Florida 33130
22 12:56 p.m. - 4:47 p.m.

23 Reported By:
24 Jeana Ricciuti, CRR, RPR, FPR, CLR
25 Notary Public, State of Florida
 U.S. Legal Support, Inc.

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1 when I finish these instructions, "Parties will
2 present their argument." How is that?

3 MR. BELASIC: Sure, Your Honor. Yes.

4 MR. ALVAREZ: Here's the clean set, and here
5 is the verdict form.

6 THE COURT: Okay.

7 (Recess.)

8 (Jury entering at 3:27 p.m.)

9 THE COURT: Note the presence of the jury and
10 the parties.

11 Members of the jury, I am now going to tell
12 you about the rules of law that apply in
13 determining whether punitive damages should be
14 assessed, and if so, in what amount. When I finish
15 with these instructions, the parties will present
16 their final arguments to you with regard to
17 punitive damages.

18 You should consider these arguments along with
19 the evidence that's already been presented, and you
20 should decide any disputed facts -- any disputed
21 factual issues by the greater weight of the
22 evidence.

23 Greater weight of the evidence means the more
24 persuasive and convincing force and effect of the
25 entire evidence in the case.

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1 Punitive damages may be awarded against
2 Reynolds based only on your findings that Reynolds
3 is liable to William Crawford for fraudulent
4 concealment or conspiracy to fraudulently conceal.
5 Thus, in determining the amount of punitive damages
6 to be awarded against Reynolds, if any, you may
7 punish Reynolds only for the injury caused to
8 William Crawford by the specific conduct of
9 Reynolds that was the basis for your finding that
10 Reynolds is liable to William Crawford on his
11 claims involving concealment or conspiracy to
12 conceal.

13 You should not consider the conduct underlying
14 William Crawford's claim for strict liability or
15 negligence.

16 You are to decide the amount of punitive
17 damages, if any, to be assessed against Reynolds as
18 punishment and as a detriment to others. This
19 amount should be in addition to the compensatory
20 damages you have previously awarded.

21 In making this determination, you should
22 consider the following:

23 One, the nature, extent, and degree of
24 Reynolds' misconduct that caused William Crawford's
25 laryngeal cancer and the related circumstances;

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1 Two, the conduct and action of others,
2 including William Crawford;

3 And three, whether there is a continuing need
4 for deterrence in light of any changes in the
5 conduct of Reynolds from the conduct on which you
6 based your determination of punitive damages were
7 warranted.

8 However, you may not award an amount that
9 would financially destroy Reynolds. You may, in
10 your discretion, decline to assess punitive
11 damages. For the purpose of determining the
12 amount, if any, of punitive damages, you may not
13 consider in any way the findings from the prior
14 lawsuit that I have described to you earlier. You
15 should impose punitive damages only if you conclude
16 that monetary liability beyond your award of
17 compensatory damages is necessary to accomplish
18 punishment and deterrence.

19 You should not award punitive damages if you
20 conclude that those purposes will be satisfied by
21 Reynolds' compensatory liability.

22 If you decide to award punitive damages
23 against Reynolds, the award should be no greater
24 than the amount that you find necessary to punish
25 Reynolds for the smoking-related injury caused to

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1 William Crawford and to deter Reynolds and others
2 similarly situated from engaging in such misconduct
3 in the future. When determining the amount, if
4 any, of punitive damages to be awarded, you may not
5 impose punitive damages to punish Reynolds for
6 conduct that was not shown by clear and convincing
7 evidence to have caused William Crawford's
8 laryngeal cancer.

9 Any award of punitive damages is solely for
10 the injury caused to William Crawford and should
11 not include punishment for harm suffered by other
12 smokers when making them bring their own claims for
13 punitive damages in other cases.

14 You may punish Reynolds only for injury caused
15 to William Crawford by the specific conduct of
16 Reynolds that was the basis for your finding that
17 punitive damages are warranted against Reynolds.

18 Any amount of punitive damages you award must
19 not be unreasonably large when considered in
20 relation to the amount of compensatory damages you
21 have awarded to William Crawford.

22 In determining the amount of punitive damages,
23 if any, you may not consider Reynolds' wealth,
24 size, or financial condition.

25 In determining the amount of punitive damages,

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1 if any, you may not punish Reynolds for any conduct
2 that complied with federal or state law or was
3 authorized by federal or state law, or was
4 otherwise lawful where it occurred.

5 In determining the amount of punitive damages,
6 if any, you may not punish Reynolds for conduct
7 that did not produce harms within the state of
8 Florida.

9 The manufacture and sale of cigarettes is a
10 lawful activity protected by federal law;
11 therefore, you may not impose punitive damages to
12 punish Reynolds for simply manufacturing, selling,
13 or advertising cigarettes.

14 Conduct that is incident to the proper conduct
15 of litigation, whether in the courtroom or outside
16 of it, is accorded legal protection. Actions taken
17 by Reynolds solely to defend against litigation
18 cannot be the basis on which to impose punitive
19 damages in this action.

20 You should also take into consideration any
21 mitigating evidence.

22 Mitigating evidence is evidence which may
23 demonstrate that there is no need for punitive
24 damage or that a reduced amount of punitive damages
25 should be imposed against Reynolds.

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1 In considering whether punitive damages are
2 necessary, and if so, how much to award against
3 Reynolds, you should consider the extent to which
4 Reynolds' conduct has changed from the conduct on
5 which you based your determination that punitive
6 damages were warranted and the extent to which
7 circumstances have changed.

8 You are entitled to conclude that misconduct
9 that occurred in the distant past and involved
10 actors who are no longer associated with Reynolds
11 need not be punished or that it should be punished
12 less severely than recent misconduct.

13 That is the law you are to follow in deciding
14 the second phase of the case. The attorneys for
15 the parties will now present their final arguments.
16 When they are through, I will have a few final
17 instructions for your deliberation.

18 Mr. Alvarez.

19 MR. ALVAREZ: May it please Your Honor and the
20 Court, Counsel, Mr. Crawford.

21 I'll be very brief; less than 15 minutes.
22 But -- and I think the reason for my brevity is
23 that I think you've heard the evidence. I think
24 you know what this case is about. I think I don't
25 have to convince you of anything. You have seen

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1 the compelling evidence in this case, and you've
2 spoken by your Phase 1 verdict that punitive
3 damages are warranted in this case. And that's why
4 we're here.

5 Let me just tell you, first of all, the Judge
6 read you some instructions. But some of the things
7 that are most important that I would like to talk
8 to you about is that in determining the amount of
9 punitive damages to be awarded against Reynolds, if
10 any, you may punish Reynolds only for the injury
11 caused to William Crawford by the specific conduct
12 of Reynolds that was the basis for your finding
13 that Reynolds is liable to William Crawford on his
14 claim involving concealment or conspiracy to
15 conceal.

16 And that's important, because what we want,
17 and the only thing we want, is you to punish that
18 company for what they did to that man. And that's
19 what we want you to consider. That and only that.

20 And the reason they need to be punished is,
21 this is a deterrent for others so they don't act
22 this way. We cannot allow other companies to act
23 this way. Your verdict is a deterrent to other
24 companies acting this way. If you don't deter
25 them, no one will. If its not now, when?

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1 The purpose of Dr. Figlar -- part of the
2 purpose of Dr. Figlar was to tell you, or try to
3 convince you, that they are a changed company.
4 That somehow they're changed. That we're not the
5 same people. We're not those old men that used to
6 say those things anymore. We are different. That
7 was the purpose of Dr. Figlar.

8 There's two things with that: Number one, it
9 doesn't matter. It doesn't matter, because you
10 have the right to punish them for what they did to
11 this man. Whether they're changed now or not, you
12 still have the right to punish them.

13 But I will submit to you that they are not
14 changed. That they have never changed.

15 And what they call youth smokers are nothing
16 more than the replacement smokers that they talk
17 about. When you hear the words "replacement
18 smokers," all they're talking about are teenagers.

19 And that document that we saw that said,
20 "Well, that as a mistake. Oh, no, it was really 18
21 to 24." Well, was this one a mistake when it
22 showed that they were talking about teenagers? Was
23 this a mistake when they were talking about 12- to
24 17-year-old kids? Was this a mistake in 1990 when
25 they wrote to a middle school principal and said

1 IN THE CIRCUIT COURT OF THE
2 11TH JUDICIAL CIRCUIT IN AND
3 FOR MIAMI-DADE COUNTY, FLORIDA
4 CIVIL CIRCUIT DIVISION
5 CASE NO: 12-18904 CA 42
6

7 SHERRI HUBBIRD, as
8 Personal Representative of the
9 Estate of DAVID R. ELLSWORTH,
10 deceased, and on behalf of KERRI L. ELLSWORTH,
11 Plaintiff,
12 v.
13 R.J. REYNOLDS TOBACCO COMPANY,
14 Defendant.

15 Miami-Dade County Courthouse
16 73 West Flagler Street
17 Miami, Florida
18 Friday, 2:00 - 5:20 p.m.
19 August 29, 2014

20 Volume 35, Pages 4723- 4874

21 The above-entitled cause came on for Jury Trial
22 before the Honorable Jacqueline Hogan Scola, Circuit
23 Court Judge, taken before Suzanne Vitale, Registered
24 Professional Reporter, Florida Professional Reporter
25 and Notary Public in and for the State of Florida at
Large.

Page 4824

1 you about the rules of law that apply to
2 determining whether punitive damages should be
3 assessed and, if so, in what amount. When I
4 finish with these instructions, the parties
5 will present -- well, they will present their
6 closing arguments.

7 You should consider this argument,
8 additional argument, along with the evidence
9 that has been presented, and you should decide
10 any disputed factual issues by the greater
11 weight of the evidence.

12 Greater weight of the evidence means the
13 more persuasive and convincing force and effect
14 of the entire evidence in the case.

15 You will now determine the amount of
16 punitive damages, if any, to be assessed
17 against Reynolds as punishment and as a
18 deterrent to others. This amount would be in
19 addition to the compensatory damages you have
20 previously awarded.

21 In making this determination, you should
22 consider the following.

23 One, the nature, extent and degree of
24 Reynolds's misconduct that caused
25 Mr. Ellsworth's non-BAC lung cancer, and the

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1 for the injury caused to Mr. Ellsworth and
2 should not include harms suffered by other
3 smokers who may bring their own claims for
4 punitive damages in other cases.

5 You may punish Reynolds only for the
6 injury caused to Mr. Ellsworth by the specific
7 conduct of Reynolds that was the basis for your
8 finding that punitive damages are warranted
9 against Reynolds.

10 You may consider evidence concerning harms
11 allegedly suffered by persons who are not
12 parties to this case for the limited purpose of
13 any light it might shed on the degree of
14 blameworthiness of Reynolds' conduct, if any,
15 that caused Mr. Ellsworth's non-BAC lung
16 cancer.

17 You may consider evidence regarding
18 conduct that allegedly caused harm to other
19 persons, other than Mr. Ellsworth, only to the
20 extent that it was substantially similar to the
21 specific conduct that actually caused
22 Mr. Ellsworth's non-BAC lung cancer such that
23 it essentially replicated that conduct.

24 Any amount of punitive damages you award
25 must be considered in relation to the amount of

Page 4825

1 related circumstances.

2 Two, the conduct and actions of others,
3 including Mr. Ellsworth.

4 And three, whether there is a continuing
5 need for deterrence in light of any changes in
6 the conduct of Reynolds from the conduct on
7 which you based your determination that
8 punitive damages were warranted.

9 However, you may not award an amount that
10 would financially destroy Reynolds. You may,
11 in your discretion, decline to assess punitive
12 damages.

13 You should impose punitive damages only if
14 you conclude that monetary liability beyond
15 your award of compensatory damages is necessary
16 to accomplish punishment and deterrence.

17 You should not award punitive damages if
18 you conclude that those purposes will be
19 satisfied by an award of compensatory damages.

20 For the purpose of determining the amount
21 of punitive damages, if any, you may not
22 consider in any way the Engle findings
23 regarding Reynolds' conduct from the prior
24 trial that I described to you earlier.

25 Any award of punitive damages is solely

Page 4827

1 compensatory damages you have awarded to the
2 plaintiff.

3 If you decide to award punitive damages
4 against Reynolds, the award should be no
5 greater than the amount that you find necessary
6 to punish Reynolds for the smoking-related
7 injury caused to Mr. Ellsworth by Reynolds'
8 conduct and to deter Reynolds and others
9 similarly situated from engaging in such
10 misconduct in the future.

11 You have heard evidence of Reynolds'
12 financial condition. This evidence was
13 presented because you are not to make an award
14 that would financially debilitate. At the same
15 time, you should not use Reynolds' financial
16 condition as a basis for increasing any award
17 against Reynolds.

18 In determining the amount of punitive
19 damages, if any, you may not punish Reynolds
20 for any conduct that complied with federal or
21 state law or was authorized by federal or state
22 law or was otherwise lawful where it occurred.

23 The manufacture and sale of cigarettes is
24 a lawful activity protected by federal law.
25 Therefore, you may not impose punitive damages

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1 to punish Reynolds for simply manufacturing,
2 selling or advertising cigarettes.

3 Conduct that is incident to a proper
4 response to litigation, whether in the
5 courtroom or outside of it, is afforded legal
6 protection. Actions taken by Reynolds solely
7 to defend against litigation cannot form a
8 basis in which to impose punitive damages in
9 this action.

10 In considering whether punitive damages
11 are necessary and, if so, how much to award
12 against Reynolds, you should consider the
13 extent to which Reynolds' conduct has changed
14 from the conduct on which you based your
15 determination that punitive damages may be
16 warranted and the extent to which the
17 circumstances have changed.

18 You are entitled to conclude that this
19 conduct that occurred in the distant past and
20 involved actors who are no longer associated
21 with Reynolds need not be punished or that it
22 should be punished less severely than recent
23 misconduct.

24 You should also take into consideration
25 any mitigating evidence. Mitigating evidence

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1 is evidence that may demonstrate that there is
2 no need for punitive damages or that a reduced
3 amount of punitive damages should be imposed
4 against Reynolds.

5 The warning labels placed on cigarette
6 packs and advertisements by R.J. Reynolds
7 Tobacco Company complied with federal law and
8 Reynolds had no obligation to place any
9 additional warnings on its cigarette packs and
10 advertisements after July 1, 1969.

11 Punitive damages may not be imposed on
12 Reynolds based on any alleged failure to place
13 additional or different warnings on its
14 cigarette packages after July 1, 1969.

15 The fact that Reynolds is a corporation
16 must not prejudice you in your deliberations or
17 in your verdict. You may not discriminate
18 between corporations and natural individuals.
19 Both are persons in the eyes of the law and
20 both are entitled to the same fair and
21 impartial consideration by the same legal
22 conduct.

23 That is the law that you must follow in
24 deciding this phase of the case.

25 The attorneys for the parties will now

Page 4830

1 present their final arguments. When they're
2 through, I will have a few final instructions
3 about your deliberations. Thank you.

4 Mr. Kaiser.

5 MR. KAISER: Thank you. May it please the
6 Court, Counsel, ladies and gentlemen. Good
7 afternoon. If you don't mind, I'm going to be
8 brief. Just a few topics I want to cover.

9 The fact that you heard testimony from
10 Dr. Borgerding that their company has spent all
11 sorts of money since 2000 or whatever should
12 not absolve them from punitive damages for what
13 they did 50 years ago.

14 It took them up until 2000 to publicly
15 admit what they had been doing since 1953.
16 And, for that, alone, they need to be punished,
17 because their admissions in 2000 and their
18 subsequent conduct from 2000 doesn't do
19 anything to David Ellsworth.

20 They didn't make these concessions to
21 David Ellsworth in 1994 or before. That
22 doesn't do him any good.

23 So what I want to go over is just the
24 extent of their misconduct, and we've already
25 proved our case, and you have recognized that

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1 when we proved to you, by clear and convincing
2 evidence, the conduct that warrants entitlement
3 to punitive damages. We don't need to address
4 that.

5 But we need to address the amount of
6 punitive damages. Punitive damages, in this
7 case, they need to be imposed that's going to
8 sting R.J. Reynolds. It's going to hurt them.
9 Not break them, but hurt them. That's what
10 punishment is for, so you don't forget it. Not
11 a slap on the wrist.

12 And these are a couple of things I'd like
13 to talk about for you to consider.

14 Number one, this was not misconduct that
15 just went on for a day or a month or a year.
16 This was misconduct that went on from
17 December 14th of 1953 until well after David
18 Ellsworth's death in 1994.

19 So, we're talking about, just in David
20 Ellsworth's lifetime, 40 years that R.J.
21 Reynolds was lying to the public, including
22 Mr. Ellsworth, and we know that he was exposed
23 to that and heard it by your verdict.

24 Forty years they were lying. Forty years
25 they were concealing information. This is a

1 IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA
3 COMPLEX CIVIL DIVISION
4 CASE NO.: 08-80000(19)

5
6 IN RE: ENGLE PROGENY CASES
7 TOBACCO LITIGATION

8
9 Pertains To: Ryan, Thomas and Bettye Ryan
10 v. R.J. Reynolds Tobacco Company, et al.,
11 Case No. 08-022579(19)

12
13 TRANSCRIPT OF JURY TRIAL PROCEEDINGS
14 VOLUME 18
15 PHASE II
16 (Pages 2549 - 2718)

17
18 DATE TAKEN: Monday, April 20, 2015
19 TIME: 8:38 a.m. - 12:04 p.m.
20 PLACE: Broward County Courthouse
21 201 Southeast 6th Street
Fort Lauderdale, Florida 33301
BEFORE: JOHN J. MURPHY, III, Circuit Judge

22 This cause came on to be heard at the time and
23 place aforesaid, when and where the following
24 proceedings were stenographically reported by:

25
BARBIE GALLO, RMR-CRR
www.phippsreporting.com
888-811-3408

Page 2626

1 damages are warranted for Reynolds' -- for
2 Reynolds' conduct must be based on the same or
3 similar conduct which has been shown by clear
4 and convincing evidence to have caused
5 Mr. Ryan's COPD emphysema, specifically, your
6 verdict that Reynolds fraudulently concealed and
7 conspired to fraudulently conceal, which was the
8 legal cause of Mr. Ryan's COPD.

9 In determining whether punitive damages are
10 warranted, you may also take into consideration
11 any mitigating evidence. Mitigating evidence is
12 the evidence which may demonstrate there is no
13 need to impose punitive damages or that a
14 reduced amount of punitive damages should be
15 imposed against Reynolds.

16 In determining the amount of punitive
17 damages, if any, you may not punish Reynolds for
18 any conduct that comply with federal or state
19 law, was authorized by federal or state law or
20 was otherwise lawful where it occurred. The
21 manufacture and sale of cigarettes is a lawful
22 activity protected by federal law. Therefore,
23 you may not impose punitive damages to punish
24 Reynolds for simply manufacturing, selling or
25 advertising cigarettes.

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1 In determining the amount of punitive
2 damages, if any, to assess against Reynolds, you
3 may consider the extent to which Reynolds'
4 conduct has changed from the conduct on which
5 you base your determination that punitive
6 damages may be warranted and the extent to which
7 circumstances have changed.

8 Finally, any amount of punitive damages you
9 award must bear a reasonable relationship to the
10 amount of compensatory damages which you have
11 awarded to the plaintiff. Your verdict on the
12 issues raised by the punitive damage claim of
13 Thomas Ryan against R.J. Reynolds Tobacco
14 Company must be based on the evidence that has
15 been received during the trial of the first
16 phase of this case and on evidence that has been
17 received in these proceedings and the law that I
18 have instructed you on.

19 Ladies, at this time the attorneys for each
20 side will have the opportunity to make their
21 opening statements in which they may explain to
22 you the issues in this phase of the case and
23 give you a summary of the facts that they expect
24 the evidence will show.

25 Mr. Alvarez.

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1 MR. ALVAREZ: May it please this honorable
2 court, counsel, Mr. Ryan, counsel.

3 Good morning, ladies.

4 With your verdict on Friday you told us that
5 punitive damages are warranted in this case.
6 And this is the purpose of this stage of the
7 case is to determine the amount of punitive
8 damage to be assessed.

9 It's going to be a brief phase. We're going
10 to publish certain government reports to you,
11 and then the defense will have an opportunity to
12 put on their case, and then we'll summarize our
13 closing arguments, as we did on Friday, and then
14 you'll have an opportunity to render a verdict
15 again in this case on punitive damages.

16 But let me tell you -- you've heard the
17 judge's instructions, and I want to focus on a
18 few things. I'll be very brief. I doubt I'll
19 go ten minutes. I think you've heard enough
20 from the lawyers. I think you understand what
21 the issues are in this case, and I think you
22 understand what the facts are. And what I want
23 to do is tie those together for you so you have
24 an understanding what you're supposed to be
25 doing in this phase of the trial.

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1 So the very first -- this is an instruction
2 the judge just read to you. And I think it's
3 important because this is why we are here. "You
4 will now decide the amount of punitive damages,
5 if any, to be assessed against R.J. Reynolds
6 Tobacco Company..." and these are the keywords,
7 I think. "... as punishment..." That means to
8 punish them for what they did to Mr. Ryan.
9 "...and as a deterrent to others," meaning,
10 deterring other corporations, not just other
11 tobacco companies but any corporation who acts
12 badly.

13 They have to understand that when you lie,
14 misrepresent to people knowing that it's false
15 and misleading and people get hurt, companies
16 will be held accountable this way. This is what
17 our society has said is the law, and this is a
18 check and balance system to prevent things like
19 this from happening to other people by other
20 corporations in America. And if we don't have
21 this system where other companies can look at
22 what happened here today and say, I'm going to
23 think twice about what I'm going to do because I
24 don't want the same thing to happen to us that
25 happened to R.J. Reynolds... And that is a

21 (Pages 2626 to 2629)

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO. 2010-17931 CA (31)

BRENDA CHADWELL, as Personal
Representative of the Estate
of JAMES CHADWELL, deceased,

Plaintiff,

vs.

PHILIP MORRIS USA, INC.,

Defendant.

JURY TRIAL
VOLUME 17
PAGES 2672 - 2880

DATE TAKEN: Monday, September 24, 2018
TIME: (8:30) 8:03 a.m. - 12:52 p.m.
PLACE: Miami-Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
BEFORE: Honorable Jacqueline Hogan Scola

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:

Janette P. Moreno, RMR, CRR, CLR, FPR, CRC
United Reporting, Inc.
1218 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
954-525-2221

Page 2709

instructions, after which you will decide whether, in your discretion, punitive damages will be assessed and, if so, the amount. You may, in your discretion, decline to assess punitive damages.

Punitive damages are warranted only if you find by clear and convincing evidence that, 1, the conduct causing James Chadwell's lung cancer and death was so gross and flagrant as to show a reckless disregard of human life or the safety of persons exposed to the effects of such conduct; or the conduct causing James Chadwell's lung cancer and death showed such an entire lack of care that Philip Morris USA, Inc., must have been consciously indifferent to the consequences; or, 3, the conduct causing James Chadwell's lung cancer and death showed such an entire lack of care that Philip Morris USA, Inc., must have wantonly or recklessly disregarded the safety and welfare of the public; or, 4, the conduct causing James Chadwell's lung cancer and death showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of

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caused James Chadwell's lung cancer and death.

You may consider evidence regarding conduct that allegedly caused harm to persons other than James Chadwell only to the extent that it was substantially similar to the specific conduct that actually caused his lung cancer and death.

Punitive damages may not be imposed to punish any conduct that was dissimilar to the conduct that you find harmed James Chadwell.

In determining whether punitive damages may be warranted, you should also take into consideration any mitigating evidence.

Mitigating evidence is evidence that may demonstrate that there is no need to impose punitive damages. That is the law you must follow in deciding this case.

The attorneys for the parties may now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

I remind you that what the lawyers say is not evidence, but it is intended to assist

Page 2710

those rights.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In determining whether punitive damages are warranted, you may not seek to punish Philip Morris USA, Inc., for any harm suffered by any individual other than James Chadwell.

You may consider evidence concerning harms allegedly suffered by persons who are not parties to this cause for the limited purpose of any light it might shed on the degree of reprehensibility or wrongfulness of Philip Morris USA's, Inc.'s conduct that

Page 2712

you in understanding their position on the evidence as it was presented and the law as I've just instructed you.

Each side will have equal time, but the plaintiff goes first and last because they have the burden of proving their claim by the greater weight of the evidence, and Ruby is going to give them notice, so at this time, I'm going to let the parties start.

If at any time before we take a break -- I'm planning on taking a break after the first argument, but if you need to take a break earlier, please alert the bailiff and he'll let me know. Okay?

Thank you.

Excuse me one second.

Mr. Wichmann.

MR. WICHMANN: May I proceed, Your Honor?

THE COURT: Yes, sir.

MR. PHILIPSON: Is that on?

MR. WICHMANN: How's that?

MR. PHILIPSON: Better.

MR. WICHMANN: Ms. Ruby, am I ready?

THE CLERK: I hope so.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

COMPLEX LITIGATION UNIT
Case No. 08-80000 (19)
JUDGE JOHN J. MURPHY, III

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Pertains to: JOSEPH VARNER, as Personal
Representative of the Estate of VIRGINIA VARNER
Case No.: 08-026345

JURY TRIAL
TRANSCRIPT OF PROCEEDINGS
Volume 35 - Pages 4663 - 4830

DATE TAKEN: July 18th, 2016
TIME: (8:00) 8:00 a.m. - 10:50 a.m.
PLACE: Broward County Courthouse
201 S.E. 6th Street
Fort Lauderdale, Florida 33301
BEFORE: John J. Murphy, III, Circuit Court

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were reported by:

Susan J. Sternberg, C.M.
United Reporting, Inc.
1218 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
954-525-2221

Page 4772

Reynolds Tobacco Company, as punishment and as a -- God bless -- as a deterrent to others. Any such damages would be in addition to any compensatory damages you may award.

The trial of the punitive damage claim is divided into two parts. In this first part, you will decide whether the conduct of Philip Morris USA Inc. and R.J. Reynolds Tobacco Company was such that punitive damages may be warranted.

If you decide punitive damages may be warranted, we will proceed to a second part on that issue during which the parties may present additional evidence and argument on the issue of punitive damages.

I will then give you additional legal instructions, after which you will decide whether, in your discretion, punitive damages will be assessed; and, if so, the amount. You may, in your discretion, decline to assess punitive damages.

Instruction Number 20: The burden is on the plaintiff to prove by clear and convincing evidence that punitive damages may be warranted. Clear and convincing evidence

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safety and welfare of the public; or, 4, the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

You may determine that punitive damages are warranted against one defendant and not the other, or against more than one defendant.

Instruction 22: In deciding whether punitive damages are warranted, you may not seek to punish defendants for any harm suffered by any individuals other than Virginia Varner, nor may you punish defendants for conduct that did not produce harms within the State of Florida. However, you may consider harms suffered by other persons not parties to this lawsuit in assessing the reprehensibility or wrongfulness of the defendants' acts.

Instruction 23: Your consideration of whether punitive damages are warranted for the -- a defendant's conduct must be based on the same or similar conduct which has been shown by clear and convincing evidence to have caused Virginia Varner's death.

Instruction 24: In determining whether punitive damages are warranted, you may also

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differs from the greater weight of the evidence in that it is more compelling and persuasive.

As I've already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Instruction 21: Punitive damages are warranted against one or more of the defendants if you find by clear and convincing evidence that as to each such defendant or defendants:

1: The conduct causing injury to Ms. Varner was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or, 2, the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or, 3, the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the

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take into consideration any mitigating evidence. Mitigating evidence is evidence which may demonstrate there is no need to impose punitive damages against a defendant.

Instruction 25: Members of the jury, that is the law that you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

Is there any objection to the instructions published in open court, not previously raised by plaintiffs?

MR. GDANSKI: No, sir.

THE COURT: By defendants?

MR. GERAGHTY: No, Your Honor.

MR. KEEHFUS: No, Your Honor.

THE COURT: Ladies and gentlemen, at this time, the attorneys for the parties will have an opportunity to make their closing statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence has shown.

The statements of the attorneys, their arguments, are not to be considered by you as

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

COMPLEX LITIGATION UNIT
CASE NO.: 08-80000(19)
JUDGE JOHN J. MURPHY, III

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Pertains to:
Vivian Turner, as Personal Representative of
the Estate of Vivian Wilkinson
Case No.: 2008-CV-019616(19)

JURY TRIAL
TRANSCRIPT OF PROCEEDINGS
Volume 19 - Pages 2786 - 2929

DATE TAKEN: April 19, 2016
TIME: 9:31 a.m. - 12:02 p.m.
PLACE: Broward County Courthouse
201 S.E. 6th Street
Fort Lauderdale, Florida 33301
BEFORE:
John J. Murphy, III, Circuit Court Judge

This cause came on to be heard at the time
and place aforesaid, when and where the following
proceedings were reported by:

Kelli Ann Willis, RPR, CRR, RSA
United Reporting, Inc.
1218 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
954-525-2221

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William Eugene Wilkinson's loss of his mother, Vivian Wilkinson's companionship, instruction, guidance, and William Eugene Wilkinson's mental pain and suffering as a result of Vivian Wilkinson's COPD/emphysema and death.

You may not award damages for any pain and suffering by Ms. Wilkinson.

In determining the total amount of damages to be awarded, you should not make any reduction because of the responsibility, if any, of Vivian Wilkinson. The Court will enter judgment based on your verdict, and in entering judgment will reduce the total amount of damages by the percentage of responsibility, if any, which you find is chargeable to Ms. Wilkinson.

Instruction 23: The final issue for your determination is whether, in addition to the compensatory damages, punitive damages would be warranted under the circumstances of this case against Defendant RJ Reynolds Tobacco Company as punishment and as a deterrent to others.

Any such damages would be in addition to any compensatory damages you may award.

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JUROR: I have. I'm sorry.

THE COURT: No problem. I just want to make sure you're all right.

Continuing, the burden is on the Plaintiff to prove by clear and convincing evidence that punitive damages may be warranted.

Clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive.

As I've already instructed you, greater weight means the more persuasive and convincing force and effect of the entire evidence in the case.

In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction, without hesitation, about the matter at issue.

Punitive damages are warranted against Reynolds if you find by clear and convincing evidence that Reynolds was guilty of intentional misconduct which was a substantial legal cause of Vivian Wilkinson's COPD/emphysema and death.

Under those circumstances, you may, in

Page 2848

Punitive damages may be imposed on RJ Reynolds Tobacco Company only on the basis of a finding that Reynolds was liable to Plaintiff on the claims for fraudulent concealment or conspiracy to fraudulently conceal.

Punitive damages may not be imposed on Reynolds on the basis of Plaintiff's claims for strict liability or negligence.

The trial of the punitive damages claims is divided into two parts. In this first part, you will decide whether the conduct of RJ Reynolds Tobacco Company was such that punitive damages may be warranted.

If you decide punitive damages may be warranted, we will proceed to a second part of that -- on that issue, during which the parties may present additional evidence and argument on the issue of punitive damages.

I will then give you additional legal instructions, after which you will decide whether, in your discretion, punitive damages will be assessed, and if so, the amount.

You may, in your discretion, decline to assess punitive damages.

THE COURT: Do you need a glass of water?

Page 2850

your discretion, determine that punitive damages are warranted against Reynolds.

If clear and convincing evidence does not show such conduct by Reynolds, punitive damages are not warranted.

Intentional misconduct means that Reynolds had actual knowledge of the wrongfulness of the conduct that caused Vivian Wilkinson's COPD/emphysema and death, and that there was a high probability of injury to Vivian Wilkinson, and despite that knowledge, Reynolds intentionally pursued that course of conduct resulting in Vivian Wilkinson's COPD/emphysema and death.

For purposes of determining whether punitive damages are warranted, and if so, the amount of punitive damages, you may not consider in any way the Engle findings regarding Reynolds' conduct from the prior trial that I described earlier.

In deciding whether punitive damages are warranted, you may not seek to punish Reynolds for any harms suffered by any individuals other than Vivian Wilkinson, nor may you punish Reynolds for conduct that did not produce harm

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within the State of Florida

However, you may consider harm suffered by other persons not parties to this lawsuit in assessing the reprehensibility or wrongfulness of Reynolds' acts, if those harms suffered by non-parties were caused by the same or similar conduct which has been shown by clear and convincing evidence to have caused Ms. Wilkinson's COPD/emphysema and death.

Your consideration of whether punitive damages are warranted for Reynolds' conduct must be based on the same or similar conduct which has been shown by clear and convincing evidence to have caused Vivian Wilkinson's COPD/emphysema and death.

In determining whether punitive damages are warranted, you may also take into consideration any mitigating evidence.

Mitigating evidence is evidence which may demonstrate there is no need to impose punitive damages against Reynolds.

That is the law you must follow -- Instruction 24: That is the law you must follow in deciding this case. The attorneys for the parties will now present their final

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Counsel.

Good morning.

JURORS: Good morning.

MR. ROSEN: It has been just shy of two weeks since we started this process, just shy of two weeks, and I think we are actually a little bit ahead of schedule. So that's good.

I tried to move quickly through witnesses, and I know sometimes things got a little bit slow, but I hope that we presented some interesting, unique issues, you got to learn some science, medicine, and that you got to see some great witnesses in this case.

The information that you now have, you know, I really -- thinking about this, you probably have more information about the tobacco industry and smoking and health than probably 99 percent of the US population. I feel confident in that.

And that information is powerful. Okay? Because I think -- I think I said this early on in the case: What you thought you knew about cigarettes and about smokers and about the cigarette industry might be very, very different than what you learned in this

Page 2852

arguments. When they are through, I will have a few final instructions about your deliberations.

Before we proceed further, ladies and gentlemen, do you have your water there, sir?

JUROR: I'm good.

THE COURT: You're good?

JUROR: Yeah. I have everything. Thanks.

THE COURT: No problem.

I want to remind you what the attorneys say is not evidence, nor your instructions on the law.

Their arguments are a final opportunity for the attorneys to discuss the case with you and to persuade you to reach a verdict in favor of their client.

Each side has equal time. Plaintiff's attorney normally goes first, then the defense attorney will make his argument. And, finally, Plaintiff's attorney may make what is called a rebuttal argument.

Please give the attorneys your close attention.

Mr. Rosen.

MR. ROSEN: May it please the Court.

Page 2854

courtroom.

I want to thank every one of you for your patience and for sacrificing and being here on behalf of Vivian and William. We thank you.

All right. And so now we are coming to the end of this case, for you to make a decision and to decide the outcome of who wins, who loses, what is right, what is wrong.

And so what is going to happen in probably a couple of hours is you are going to go back to that jury room and you are going to get a verdict form.

The Judge read you these instructions, and you are going to have to review all of those instructions.

You are going to have the verdict form. The way I'm going to try to go through it is as succinctly as possible. You are going to have the verdict form. I'm going to run through it right now with you to understand what the issues are and what we are going to be talking about.

You heard and saw a lot of evidence. You heard a lot of evidence about the tobacco industry, and you heard and saw a lot of

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1 IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
2 IN AND FOR BROWARD COUNTY, STATE OF FLORIDA
3 COMPLEX CIVIL DIVISION

4 CASE NO. 08-80000 (19)

5 IN RE: ENGLE PROGENY CASES
6 TOBACCO LITIGATION

7 **Pertains to: Bernice McCall,**
8 **individually and as Personal**
9 **Representative of the Estate of Martin**
10 **McCall**

11 Case No.: 2007-CV-36888 (19)
12 -----/

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JURY TRIAL BEFORE THE HONORABLE
JOHN J. MURPHY, III
CIRCUIT COURT JUDGE

(Volume 26)

Pages 3504 to 3672

Tuesday, March 1, 2016
8:24 a.m. - 12:20 p.m.

Broward County Courthouse
201 Southeast 6th Street
Courtroom 850
Fort Lauderdale, Florida 33301

STENOGRAPHICALLY REPORTED BY:
NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R.
Certificate in Realtime Systems Administration
Certified Realtime Reporter
Registered Professional Reporter
Florida Professional Reporter

<p style="text-align: right;">3549</p> <p>1 liability or negligence.</p> <p>2 The trial of the punitive damages claims is</p> <p>3 divided into two parts. In this first part, you</p> <p>4 will decide whether the conduct of Philip Morris</p> <p>5 USA, Inc., was such that punitive damages may be</p> <p>6 warranted. If you decide punitive damages may be</p> <p>7 warranted, we will proceed to a second part on that</p> <p>8 issue during which the parties may present</p> <p>9 additional evidence and argument on the issue of</p> <p>10 punitive damages. I will then give you additional</p> <p>11 legal instructions, after which you will decide</p> <p>12 whether, in your discretion, punitive damages will</p> <p>13 be assessed, and, if so, the amount. You may, in</p> <p>14 your discretion, decline to assess punitive</p> <p>15 damages.</p> <p>16 The burden is on the Plaintiff to prove by</p> <p>17 clear and convincing evidence that punitive damages</p> <p>18 may be warranted. Clear and convincing evidence</p> <p>19 differs from the greater weight of the evidence in</p> <p>20 that it is more compelling and persuasive.</p> <p>21 As I've already instructed you, greater weight</p> <p>22 means the more persuasive and convincing force and</p> <p>23 effect of the entire evidence in the case. In</p> <p>24 contrast, clear and convincing evidence is evidence</p> <p>25 that is precise, explicit, lacking in confusion,</p>	<p style="text-align: right;">3551</p> <p>1 regarding Philip Morris USA, Inc.'s conduct from</p> <p>2 the prior trial that I described earlier.</p> <p>3 In deciding whether punitive damages are</p> <p>4 warranted, you may not seek to punish Philip Morris</p> <p>5 USA, Inc., for any harms suffered by any</p> <p>6 individuals other than Martin McCall, nor may you</p> <p>7 punish Philip Morris USA, Inc., for conduct that</p> <p>8 did not produce harms within the state of Florida.</p> <p>9 However, you may consider harms suffered by other</p> <p>10 persons not parties to this lawsuit in assessing</p> <p>11 the reprehensibility or wrongfulness of Philip</p> <p>12 Morris USA, Inc.'s acts.</p> <p>13 Your consideration of whether punitive damages</p> <p>14 are warranted for Philip Morris USA, Inc.'s conduct</p> <p>15 must be based on the same or similar conduct which</p> <p>16 has been shown by clear and convincing evidence to</p> <p>17 have caused Martin McCall's lung cancer. In</p> <p>18 determining whether punitive damages are warranted,</p> <p>19 you may also take into consideration any mitigating</p> <p>20 evidence. Mitigating evidence is evidence which</p> <p>21 may demonstrate there is no need to impose punitive</p> <p>22 damages against Philip Morris USA, Inc.</p> <p>23 Instruction Number 26. Members of the jury,</p> <p>24 that is the law you must follow in deciding this</p> <p>25 case. The attorneys for the parties will now</p>
<p style="text-align: right;">3550</p> <p>1 and of such weight that it produces a firm belief</p> <p>2 or conviction, without hesitation, about the matter</p> <p>3 in issue.</p> <p>4 Punitive damages are warranted against Philip</p> <p>5 Morris USA, Inc., excuse me, if you find by clear</p> <p>6 and convincing evidence that Philip Morris USA,</p> <p>7 Inc., was guilty of intentional misconduct which</p> <p>8 was a substantial cause of Martin McCall's lung</p> <p>9 cancer. Under those circumstances, you may, in</p> <p>10 your discretion, award punitive damages against</p> <p>11 Philip Morris USA, Inc. If clear and convincing</p> <p>12 evidence does not show such conduct by Philip</p> <p>13 Morris USA, Inc., punitive damages are not</p> <p>14 warranted against Philip Morris USA, Inc.</p> <p>15 Intentional misconduct means that Philip</p> <p>16 Morris USA, Inc., had actual knowledge of the</p> <p>17 wrongfulness of the conduct and there was a high</p> <p>18 probability of injury or damage to Martin McCall</p> <p>19 and, despite that knowledge, Philip Morris USA,</p> <p>20 Inc., intentionally pursued that course of conduct,</p> <p>21 resulting in injury or damage.</p> <p>22 For purposes of determining whether punitive</p> <p>23 damages are warranted against Philip Morris USA,</p> <p>24 Inc., and if so, the amount of punitive damages,</p> <p>25 you may not consider in any way the Engle findings</p>	<p style="text-align: right;">3552</p> <p>1 present their final arguments. When they are</p> <p>2 through, I will have a few final instructions about</p> <p>3 your deliberations.</p> <p>4 Are there any objections to the instructions</p> <p>5 as published in open court not previously raised by</p> <p>6 Plaintiff?</p> <p>7 MR. ALEX ALVAREZ: No, on behalf--</p> <p>8 MR. BRENNER: Your Honor, I just need to</p> <p>9 approach for 30 seconds.</p> <p>10 (The following proceedings were had before the</p> <p>11 Court at the bench and out of the hearing of the jury.)</p> <p>12 MR. BRENNER: We caught this when you read it.</p> <p>13 The instruction, it says --</p> <p>14 MR. ALEX ALVAREZ: Can I see that?</p> <p>15 MR. BRENNER: Yes.</p> <p>16 It just says "fault". It should "at fault".</p> <p>17 THE COURT REPORTER: Excuse me. Could you</p> <p>18 move closer to the microphone?</p> <p>19 THE COURT: Start over. I'm sorry.</p> <p>20 MR. BRENNER: On Instruction Number 16, Your</p> <p>21 Honor, when you read it, saw that there was a typo</p> <p>22 in the instruction and corrected it in your verbal</p> <p>23 instructions. The written instruction says, "You</p> <p>24 must determine whether Martin McCall was himself</p> <p>25 fault." Your Honor corrected and added the word</p>

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

COMPLEX CIVIL DIVISION

CASE NO. 08-80000(19)

JUDGE JEFFREY E. STREITFELD

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Pertains to: COHEN, 2007-CV 11515(19)

VOLUME 25 - Pages 2957 to 3133

The above entitled cause came on for jury trial
before the Honorable Jeffrey E. Streitfeld, Judge of
the above styled court, on Tuesday, March 23, 2010,
at the Broward County Courthouse, 201 S.E. 6th
Street, Room 970, Fort Lauderdale, Florida,
commencing at 9:00 a.m.

Reported by: Kimberly Fontalvo, RPR, CLNR,
Notary Public, State of Florida

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1 detriment on a statement that he received from
2 a Defendant, that concealed or omitted material
3 information about the health effects or
4 addictive nature of smoking, or you find that
5 Mr. Cohen reasonably relied to his detriment on
6 a statement made in furtherance of a
7 Defendant's agreement to conceal or omit
8 material information, and such reliance was a
9 legal cause of Nathan Cohen's death.

10 If you find in favor of the Plaintiff,
11 Mrs. Cohen, on one of these claims as to a
12 Defendant, then you should consider whether in
13 addition to compensatory damages, punitive
14 damages are warranted against that Defendant in
15 the circumstances of this case as punishment
16 for conduct causing Mr. Cohen's death and as a
17 deterrent to others.

18 Punitive damages are warranted against a
19 Defendant if you find by clear and convincing
20 evidence that the conduct causing damage to
21 Nathan Cohen was so gross and flagrant as to
22 show a reckless disregard of the safety of
23 Nathan Cohen, or the conduct causing damage to
24 Nathan Cohen showed such an entire lack of care
25 that a high ranking official of the Defendant

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1 For purposes of determining whether
2 Mrs. Cohen is entitled to punitive damages or
3 if so the amount of punitive damages, you may
4 not consider in any way the findings regarding
5 the Defendants' conduct from the prior lawsuit
6 that I described to you earlier.

7 In determining whether punitive damages
8 are warranted and if so in determining the
9 amount of any such damages, you may not seek to
10 punish a Defendant for any harms suffered by
11 any persons other than Nathan Cohen.

12 In determining whether punitive damages
13 are warranted against the Defendant and if so
14 in determining the amount of any such damages,
15 you may not seek to punish a Defendant for any
16 harm inflicted upon Nathan Cohen, except those
17 caused by that Defendant's punishable conduct.

18 Conduct that is incident to a proper
19 response to litigation, whether in the
20 courtroom or outside of it, is afforded legal
21 protection. Actions taken solely to defend
22 against litigation cannot form a basis on which
23 to impose punitive damages in this action.

24 If you find that punitive damages are
25 warranted against a Defendant, you will

Page 3119

1 must have been consciously indifferent to the
2 consequences to Nathan Cohen, or the conduct
3 causing damage to Nathan Cohen showed such an
4 entire lack of care that a high ranking
5 official of the Defendant must have wantonly or
6 recklessly disregarded the safety and welfare
7 of Nathan Cohen, or the conduct showed such
8 reckless indifference to the rights of Nathan
9 Cohen as to be equivalent to an intentional
10 violation of those rights.

11 Now, you will notice that with some
12 emphasis I mentioned these issues are to be
13 decided by clear and convincing evidence.
14 Clear and convincing evidence differs from the
15 greater weight of the evidence in that it is
16 more compelling and persuasive.

17 As I've told you, greater weight of the
18 evidence means the more the more persuasive and
19 convincing force and effect of the entire
20 evidence in this case.

21 In contrast, clear and convincing evidence
22 is evidence that is precise, explicit, lacking
23 in confusion, and of such weight that it
24 produces a firm belief or conviction without
25 hesitation about the matter in issue.

Page 3121

1 determine by the greater weight of the evidence
2 the amount of punitive damages, if any, to be
3 assessed against that Defendant as punishment
4 and as a deterrent to others. This amount will
5 be in addition to the compensatory damages you
6 previously have awarded.

7 In making this determination, you should
8 consider the nature, degree and extent of this
9 conduct and the related circumstances. You may
10 not, however, impose punitive damages to punish
11 the Defendants for harms caused to others whose
12 cases are not before you. You may punish the
13 Defendant only for harm done to Nathan Cohen by
14 the specific conduct that formed the basis for
15 your finding that punitive damages are
16 warranted.

17 You shall also consider the conduct and
18 acts of others, including Nathan Cohen, and any
19 fault that you attribute to Nathan Cohen, and
20 you should consider the extent to which the
21 Defendants' conduct has changed from the
22 conduct on which you based your determination
23 that punitive damages were warranted, and the
24 extent to which circumstances have changed.

25 You may, in your discretion, decline to

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

LESIA MOONEY, as Personal
Representative of the Estate of
BARBARA JUNE MEACHAM, *et al.*,

Plaintiff,

CASE NO.: 11-40815 CA 23

v.

R.J. REYNOLDS TOBACCO COMPANY,
et al.,

Defendants.

DEFENDANTS' CONTINGENT ALTERNATIVE PROPOSED
FINAL PHASE I JURY INSTRUCTIONS AND VERDICT FORM

DEFENDANTS' PROPOSED INSTRUCTION NO. 7

Engle Findings

If you find that an addiction to cigarettes containing nicotine was a legal cause of Ms. Meacham's lung cancer and death, then you must accept the following previously determined matters as true for the purposes of this case:

- (1) Smoking cigarettes causes lung cancer.
- (2) Nicotine in cigarettes is addictive.
- (3) Each Defendant placed cigarettes on the market that were defective and unreasonably dangerous.
- (4) Each Defendant was negligent.
- (5) Each Defendant concealed or omitted material information not otherwise known or available knowing that the material was false and misleading, or failed to disclose a material fact concerning the health effects or addictive nature of cigarettes or both.
- (6) Each Defendant entered into an agreement to conceal or omit information regarding the health effects of cigarette smoking or the addictive nature of smoking cigarettes.

Your consideration and use of these findings will be subject to additional limitations:

First, you must not consider these findings in determining whether Plaintiff has proven that an addiction to cigarettes containing nicotine was a legal cause of Ms. Meacham's lung cancer and death. The findings do not apply to Plaintiff's claims in this case unless you have first determined, without considering or applying those findings, that Plaintiff has met her burden of proving that issue.

Second, these findings do not establish that either Defendant is liable to Plaintiff in this case. Nor do they establish whether Ms. Meacham was injured by either Defendant's conduct or

the degree, if any, to which either Defendant's conduct was a legal cause of Ms. Meacham's lung cancer and death.

Third, the findings establish only what they expressly state, and you must not speculate or guess as to the basis for the findings.

Fourth, the findings may not be considered when determining whether punitive damages are warranted against either Defendant. You must treat these findings as if they do not exist and must make your determination regarding whether punitive damages are warranted based solely upon the actual evidence presented to you in this trial.

AUTHORITY: *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1227 (Fla. 2016) (holding "that the res judicata effect of the Phase I findings addressed in *Engle* has no application to claims for punitive damages sought by *Engle* progeny plaintiffs"); *see id.* at 1228 (progeny plaintiffs are "back to square one on the issue of punitive damages"); *see id.* (after *Engle* decision vacated the class-wide punitive damages finding, "the slate was wiped clean as it pertained to punitive damages"); *see id.* at 1230 (*Engle* plaintiff's "reliance on the Phase I findings was not relevant to her claim for punitive damages, which she had to independently prove"); Nov. 19, 2015 Trial Tr. at 4398, 4410, *Finali v. R.J. Reynolds Tobacco Co.*, No. 50 2008 CA 000800 (Fla. 15th Cir. Ct.); Nov. 19, 2015 Trial Tr. at 8109, *Shulman v. R.J. Reynolds Tobacco Co.*, No. 50 2007 CA 023832 (Fla. 15th Cir. Ct.); Oct. 23, 2015 Trial Tr. at 3911-13, *In Re: Engle Progeny Cases Tobacco Litig. (Robertson)*, No. 07-CA-36442(19); Sept. 18, 2015 Trial Tr. at 4365-66, *Suarez v. R.J. Reynolds Tobacco Co.*, No. 09-79584 CA 22 (Fla. 11th Cir. Ct.); Aug. 17, 2015 Trial Tr. at 1885, *Santos v. R.J. Reynolds Tobacco Co.*, No. 08-00849-CA-10 (Fla. 11th Cir. Ct.); June 16, 2015 Trial Tr. at 4016-17, *Hardin v. R.J. Reynolds Tobacco Co.*, No. 12-29000-CA(31 (Fla. 11th Cir. Ct.); Apr. 22, 2015 Trial Tr. at 1114-17, *Russo v. Philip Morris USA Inc.*, No. 07-44469 CA 01 (Fla. 11th Cir. Ct.); Sept. 4, 2014 Trial Tr. at 3442-43, *Baum v. R.J. Reynolds Tobacco Co.*, No. 10-60768-CA-20 (Fla. 11th Cir. Ct.) (giving substantially similar instruction); Aug. 25, 2014 Trial Tr. at 2663, *Gore v. R.J. Reynolds Tobacco Co.*, No. 31-2008-010052-CA-04 (Fla. 19th Cir. Ct.) (same); Aug. 20, 2013 Trial Tr. at 2299-2302, *In Re: Engle Progeny Cases Tobacco Litig. (Dombey)*, No. 2010-CV-47211 (19) (Fla. 17th Cir. Ct.) (same); *see also* Mar. 26, 2014 Trial Tr. at 3742-44, *In Re Engle Progeny Cases Tobacco Litig. (Sammarco)*, No. 08-80000 (Fla. 17th Cir. Ct.)

(same); Jan. 23, 2014 Trial Tr. at 2501-03, *In Re: Engle Progeny Cases Tobacco Litig. (Cheeley)*, No. 08-022583 (Fla. 17th Cir. Ct.) (same); June 24, 2013 Trial Tr. at 3314, *Hausner v. R.J. Reynolds Tobacco Co.*, No. 01-08-CA-003832 (Fla. 8th Cir. Ct.) (same); May 22, 2013 Trial Tr. at 4066-67, *Campbell v. R.J. Reynolds Tobacco Co.*, No. 2011-CA-005960 (Fla. 10th Cir. Ct.) (same); May 1, 2013 Trial Tr. at 7268-69, *LaMotte v. R.J. Reynolds Tobacco Co.*, No. 2010-CA-003072 (Fla. 1st Cir. Ct.) (same); Apr. 30, 2013 Trial Tr. at 7313-14, *Cohen v. R.J. Reynolds Tobacco Co.*, No. 50 2009 CA 004042 XXXX MB (AI) (Fla. 15th Cir. Ct.) (same); Mar. 20, 2013 Trial Tr. at 2567, *Marotta v. R.J. Reynolds Tobacco Co.*, No. 07-036723 CACE 19 (Fla. 17th Cir. Ct.) (same).

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CASE NO.: 2014-18677 CA 01

MARK COHEN, as Personal Representative
of the Estate of SHIRLEY COHEN,

Plaintiff,

vs.
R.J. REYNOLDS TOBACCO COMPANY,
a foreign corporation; PHILIP MORRIS USA, INC.,
a foreign corporation; LORILLARD TOBACCO COMPANY,
a foreign corporation; LIGGETT GROUP, LLC,
(f/k/a Liggett Group, Inc.; f/k/a Liggett & Myers
Tobacco Company) and VECTOR GROUP LTD, INC.,
(f/k/a Smoke Group, Ltd), a foreign corporation,
Defendants.

TRANSCRIPT OF TRIAL PROCEEDINGS
VOLUME 21
(Pages 2781 - 3035)

DATE TAKEN: Thursday, June 21, 2018
TIME: 11:02 a.m. - 8:17 p.m.
PLACE: Miami-Dade County Courthouse
Courtroom 2-1
73 West Flagler Street
Miami, Florida 33130
BEFORE: BARBARA ARECES, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:

BARBIE GALLO, RMR-CRR
www.philipsreporting.com
888-811-3408

I N D E X

1	JURY INSTRUCTIONS	
3	CLOSING ARGUMENTS	
4	BY MR. ALVAREZ	
4	BY MR. PERSONS	
5	BY MR. ALVAREZ	
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16	JURY QUESTION	3010
17	JURY QUESTION	3019

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24 btepiikian@shb.com

1 Thereupon,

2 The following proceedings resumed at 11:02 a.m.:

3 * * *

4 THE COURT: All right.

5 MR. ALVAREZ: There's just a couple of
6 objections or issues that they have with some of
7 the closing slides. It's not going to take
8 long, and I think there's only a few.

9 THE COURT: All right.

10 MR. EDSON: The first one, I think, is
11 slide 5, and I have a copy that would make it
12 easier for him to put them up on the board for
13 Your Honor.

14 MR. ALVAREZ: 5.

15 THE COURT: Okay.

16 MR. EDSON: And it's just the very last
17 bullet point. His master's thesis, 1986, says
18 that smokers should switch to low-tar and
19 nicotine. Your Honor, this is the issue that
20 came up yesterday, and I have the trial
21 testimony starting at 2681, and Dr. Jaffe made
22 very clear that he wasn't proposing that he was
23 reporting what was in the literature from
24 Dr. Gori, and he wasn't, in his thesis,
25 reporting that's something people should do.

2837

1 findings I previously read to you.
 2 Punitive damages are warranted if you find
 3 by clear and convincing evidence that conduct
 4 causing injury to Shirley Cohen was so gross and
 5 flagrant as to show a reckless disregard of
 6 human life or of the safety of persons exposed
 7 to the effects of such conduct, or if the
 8 conduct showed such an entire lack of care that
 9 the defendant must have been consciously
 10 indifferent to the consequences, or the conduct
 11 showed such an entire lack of care that the
 12 defendant must have wantonly or recklessly
 13 disregarded the safety and welfare of the
 14 public, or the conduct showed such reckless
 15 indifference to the rights of others as to be
 16 equivalent to an intentional violation of those
 17 rights.

18 The burden is on the plaintiff to prove by
 19 clear and convincing evidence that punitive
 20 damages may be warranted. Clear and convincing
 21 evidence differs from the greater weight of the
 22 evidence in that it is more compelling and
 23 persuasive. As I have already instructed you,
 24 greater weight of the evidence means the more
 25 persuasive and convincing force and effect of

2838

1 the entire evidence in the case.
 2 In contrast, clear and convincing evidence
 3 is evidence that is precise, explicit, lacking
 4 in confusion, and of such weight that it
 5 produces a firm belief or conviction without
 6 hesitation about the matter in issue. If you
 7 find for plaintiff and against R.J. Reynolds and
 8 you also find that clear and convincing evidence
 9 shows that the conduct of R.J. Reynolds was a
 10 substantial cause of injury to Shirley Cohen and
 11 that such conduct warrants punitive damages
 12 under the standards I have given you, then in
 13 your discretion you may determine punitive
 14 damages are warranted against R.J. Reynolds.
 15 In deciding whether punitive damages are
 16 warranted, you may not seek to punish R.J.
 17 Reynolds Tobacco Company for any harms suffered
 18 by any individuals other than Shirley Cohen, nor
 19 may you punish R.J. Reynolds Tobacco Company for
 20 conduct that did not produce harms within the
 21 state of Florida. However, you may consider
 22 harms suffered by other persons not parties to
 23 this lawsuit in assessing the reprehensibility
 24 or wrongfulness of R.J. Reynolds Tobacco
 25 Company's acts.

2839

1 Your consideration of whether punitive
 2 damages are warranted for R.J. Reynolds Tobacco
 3 Company's conduct must be based on the same or
 4 similar conduct which has been shown by clear
 5 and convincing evidence to have caused Shirley
 6 Cohen's lung cancer and death. In determining
 7 whether punitive damages are warranted, you may
 8 also take into consideration any mitigating
 9 evidence.

10 Mitigating evidence is evidence which may
 11 demonstrate there is no need to impose punitive
 12 damages against R.J. Reynolds Tobacco Company.

13 That is the law you must follow in deciding
 14 this case. The attorneys for the parties will
 15 now present their final arguments. When they
 16 are through, we'll have a few final instructions
 17 about your deliberations.

18 Just as a reminder, what the attorneys say
 19 during their closing argument is not evidence in
 20 the case. And each side is permitted equal
 21 time. I believe they're all going to -- they've
 22 limited themselves to an hour and about 45
 23 minutes. But the plaintiff is permitted to
 24 divide its time so that it may address the
 25 closing arguments of the defense in a rebuttal

2840

1 portion. So they'll each have an hour and 45
 2 minutes, and of course plaintiff goes first.

3 So whenever you're ready.
 4 MR. ALVAREZ: May it please this honorable
 5 court, counsel, Mr. Cohen.

6 What a journey. We met on June 5th. It's
 7 now June 21st. We've been here for three weeks.
 8 I told you in opening statements a few weeks ago
 9 that I hope you enjoyed history because this was
 10 going to be a history lesson. It was going to
 11 be a history lesson in tobacco, in science, in
 12 medicine, and it's a history lesson about
 13 Mrs. Cohen's life. And I wish I could give you
 14 college credit for it. I wish Dr. Proctor could
 15 give you some college credit from Stanford or
 16 from Harvard, but you definitely got a quality
 17 education from some world-class experts on some
 18 issues that you thought you knew about, but now
 19 you know.

20 You thought you knew, but now you know.

21 So I want to go through -- there's nine
 22 questions on the verdict form. The judge hasn't
 23 read that to you yet, but she will when we're
 24 done, but I want to go through. There's nine
 25 questions you have to fill out, and I want to go

2161

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CASE NO.: 11-40815 CA 01 (23)

LESIA MOONEY, individually and as Personal
Representative of the Estate of BARBARA JUNE
MEACHAM, et al.,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,
Defendants.

TRANSCRIPT OF TRIAL PROCEEDINGS
VOLUME 18
(Pages 2161 - 2360)

DATE TAKEN: Monday, June 20, 2016
TIME: 9:07 a.m. - 5:25 p.m.
PLACE: Miami-Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
BEFORE: BARBARA ARECES, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:

BARBIE GALLO, RMR-CRR
www.phippsreporting.com

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I N D E X

EXAMINATIONS

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E X H I B I T S

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2162

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2164

(Thereupon, the following proceedings resumed at
9:07 a.m.):

THE CLERK: I have asked the court reporter
to retrieve Exhibit 11,000 from the record. The
compromise was that we were going to have it
here in the morning. It is not. We are about
to start opening statements, so I'm going to ask
the court reporter to retrieve the Exhibit from
the list of admitted Exhibits.

When the disk arrive in my hands, then I
will introduce it again as an Exhibit. Okay?

MS. DAMIANI: Okay.

(A discussion was held off the record.)

THE COURT: Morning, everyone. Please be
seated. All right. Are we ready for the jury?

MR. CRUZ-ALVAREZ: Can I just say one thing,
Judge?

THE COURT: Sure.

MR. CRUZ-ALVAREZ: Your Honor, over the
weekend we had filed a motion in limine. I'm
not asking to have any argument on it. It's
simply - it was filed for a couple of purposes.
One was to preserve our position on what we
believe are the consequences of the directed
verdict that Your Honor entered.

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greater weight of the evidence shows that Miss Meacham's surviving spouse, Don Meacham, sustained as a result of Miss Meacham small cell lung cancer and death.

In determining any damages to be awarded to plaintiff for the benefit of Mr. Meacham, you shall consider certain elements of damage for which there is no exact standard measurement for fixing compensation to be awarded.

Any such award should be fair and just in light of Mr. Meacham's loss of Miss Meacham's companionship and protection and his mental pain and suffering as a result of Miss Meacham's small cell lung cancer and death.

In determining the duration of such losses, you may consider the joint life expectancy of Mr. Meacham and Mrs. Meacham together with the other evidence in the case. In determining the total amount of damages, if any, to be awarded to Mr. Meacham as a result of Miss Meacham's death, you should not make any reduction because of the responsibility you have charged to Miss Meacham. The court will enter a judgment based on your verdict and in entering judgment, will reduce the total amount of damages by the

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warranted. If you decide that punitive damages are warranted, you will then proceed to the second part of that issue during which the parties may present additional evidence and argument on the issue of punitive damages.

I will then give you additional instructions relating to punitive damages, after which you will decide whether in your discretion punitive damages will be assessed, and if so, the amount.

The burden is on the plaintiff to prove that punitive damages are warranted in this case by clear and convincing evidence. Clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive. As I have already instructed you, greater weight means the more persuasive and convincing force and effect of the evidence in the case.

In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction without hesitation about the matter at issue. For the purposes of determining whether punitive damages are warranted against either defendant, you may not

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percentage of responsibility which you find as chargeable to Miss Meacham.

In determining how long Miss Meacham would have lived had she lived out her normal life, you may consider her life expectancy at the time of her death. The mortality tables received in evidence may be considered in determining how long she may have been expected to live. Mortality tables are not binding on you. They may be considered together with the other evidence in the case bearing in mind her health, age and physical condition before her small cell lung cancer and death in determining the probable length of her life.

There is an additional claim in this case that you must decide. If you find for the plaintiff and against one or more defendants, you must decide whether in addition to compensatory damages punitive damages are warranted as punishment to one or more of the defendants as a deterrent to others.

The trial of punitive damages issue is divided into two parts. In the first part you will decide whether the conduct of each defendant was such that punitive damages are

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consider in any way the findings regarding defendant's conduct from the prior lawsuit that I described to you earlier. Plaintiff claims punitive damages should be awarded against R.J. Reynolds Tobacco Company and Philip Morris USA, Inc. for their negligence and strict liability.

Punitive damages are warranted if you find by clear and convincing evidence that, one, the conduct causing Miss Meacham's small cell lung cancer and death was so gross and flagrant as to show a reckless disregard of life or of the safety of persons exposed to the effects of such conduct; or, two, the conduct showed such an entire lack of care, the defendant must have been consciously indifferent to consequences; or, three, the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or, four, the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

If you find for plaintiff and against one or more defendants and you also find that clear and convincing evidence shows that the conduct of

<p style="text-align: right;">2181</p> <p>one or more defendants were the substantial cause of Miss Meacham's small cell lung cancer and death and that such conduct warrants the standards I have given you, then in your discretion you may determine punitive damages are warranted against one or more or both defendants.</p> <p>In determining whether punitive damages are warranted against a defendant, you may not seek to punish the defendant for any conduct except for conduct of the defendant underlying plaintiff's negligence and/or strict liability claims.</p> <p>In determining whether punitive damages are warranted against a defendant, you may only seek to punish the defendant for that defendant's own conduct, and you may not consider conduct by any other tobacco company or entity. In deciding whether punitive damages are warranted, you may not seek to punish defendants for any harm suffered by any individuals other than Barbara Meacham.</p> <p>However, you may consider harm suffered by other persons not parties to this lawsuit in assessing the reprehensibility or wrongfulness</p>	<p style="text-align: right;">2183</p> <p>jury, good morning.</p> <p>THE PANEL: Good morning.</p> <p>MR. KAISER: I think I speak for both parties in this case when I say, thank you very much for sitting as jurors over these past few weeks. Thank you for being attentive. Thank you for listening. Thank you for taking the time out of your lives to join us here, because without you, our system wouldn't work, and for that, we're very much appreciative.</p> <p>What I'd like to do, ladies and gentlemen, is you're going to have a verdict form at the end of this case, and I want to track that verdict form because there's going to be certain questions that will be asked of you that you have to answer. And so I'm going to start from the beginning, and I'm going to discuss the evidence and then suggest based on the evidence what those answers should be.</p> <p>And so the first – this is the verdict form that you're going to see. And the first question that you are going to be asked is, "Was Barbara Meacham addicted to cigarettes containing nicotine?"</p> <p>Remember, this is this whole idea of class</p>
<p style="text-align: right;">2182</p> <p>of defendants' acts. Your consideration whether punitive damages are warranted for defendants' conduct must be based on the same or similar conduct which has been shown by clear and convincing evidence to have caused Miss Meacham's small cell lung cancer and death.</p> <p>In determining whether punitive damages are warranted, you may also take into consideration any mitigating evidence. Mitigating evidence is evidence which will demonstrate there is no need to impose punitive damages against the defendant.</p> <p>That is the law you must follow in deciding this case.</p> <p>The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.</p> <p>So as usual, we will start with the plaintiff. And, remember, what the attorneys say in closing arguments is not evidence in the case.</p> <p>Whenever you're ready.</p> <p>MR. KAISER: Thank you, Your Honor. May it please the court, ladies and gentlemen of the</p>	<p style="text-align: right;">2184</p> <p>membership. So this first question is, Was she addicted to the nicotine in the cigarettes that she smoked.</p> <p>And so you heard the testimony from Dr. Prochaska from Stanford University. And what was it that she told you? Remember she had read all of the deposition testimony, reviewed the medical records, and she told you, for example, that Barbara Meacham smoked more cigarettes than she intended to smoke, and that was a consideration in assessing whether or not she was addicted, whether or not she fit the criteria in this Diagnostic and Statistical Manual 5 that she referred to as the DSM-5.</p> <p>And she told you that this idea of smoking more than intended, an example of that is on the multiple times that she tried to quit smoking, her intent was not to smoke anymore. But we've heard that she was unsuccessful, so obviously when she began to smoke, she was smoking more than she intended when she stopped.</p> <p>You heard evidence of hazardous use of cigarettes by Barbara Meacham. What do I mean by that? There was testimony that Barbara Meacham smoked in bed. That's a</p>

Tate v PM

July 7, 2010

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IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

COMPLEX CIVIL DIVISION

CASE NO. 08-80000 (19)

IN RE: ENGLE PROGENY CASES

TOBACCO LITIGATION

Pertains to: Ellen Tate, 2007-CV-021723

TRIAL - VOLUME 19 (Pages 2302 - 2345)

Wednesday, July 7, 2010

Scheduled for 1:30 p.m.

1:36 p.m. - 5:48 p.m.

PROCEEDINGS BEFORE THE HONORABLE

JEFFREY E. STREITFELD

Broward County Courthouse

201 Southeast 6th Street

Courtroom 970

Fort Lauderdale, Florida 33301

Broward County

Tate v PM

July 7, 2010

Page 2319	Page 2321
<p>1 cause of Ms. Tate's COPD/emphysema and you find in 2 favor of Ms. Tate on one or more of her other 3 claims, then you will consider comparative 4 responsibility. 5 I instruct you that Ms. Tate has admitted that 6 she shares some measure of responsibility in 7 combination with the acts or omissions of 8 Philip Morris USA. 9 You've heard evidence regarding the conduct of 10 Ms. Tate and the conduct of Philip Morris USA. A 11 party's conduct is a legal cause of injury if it 12 directly and in natural -- I know you can't believe 13 I'm saying this to you again -- a party's conduct 14 is a legal cause of loss, injury or damage if it 15 directly or in natural and continuous sequence 16 produces or contributes substantially to producing 17 such loss, injury or damage so that it can 18 reasonably be said that but for the conduct the 19 injury would not have occurred. 20 Accordingly, you must determine and write on 21 the verdict form what percentage of the total 22 responsibility for Ms. Tate's injuries you find 23 chargeable to Philip Morris USA and to Ms. Tate. 24 If your verdict is for Philip Morris USA on 25 all of Ms. Tate's claims, then you will not</p>	<p>1 responsibility which you find is caused by 2 Ms. Tate. 3 If the greater weight of the evidence shows 4 that Ms. Tate has been permanently injured, you may 5 consider her life expectancy. The mortality table 6 that was read to you in evidence may be considered 7 in determining how long Ms. Tate may be expected to 8 live. These tables are not binding upon you, but 9 may be considered altogether with all of the other 10 evidence in this case bearing on Ms. Tate's health, 11 age and physical condition before and after the 12 injury in question in determining the probable 13 length of her life. 14 We now turn to the issue of punitive damages. 15 You will consider punitive damages if and only if 16 you find that Ellen Tate reasonably relied to her 17 detriment on a statement that she received from 18 Philip Morris USA that concealed or omitted 19 material information about the health effects or 20 addictive nature of smoking or Ms. Tate reasonably 21 relied to her detriment on an act made in 22 furtherance of Philip Morris USA's agreement to 23 conceal or omit material information and such 24 reliance was a legal cause of Ms. Tate's loss, 25 injury or damage.</p>
Page 2320	Page 2322
<p>1 consider the matter of damages. But if your 2 verdict is that addiction was a legal cause of 3 Ms. Tate's COPD/emphysema, and you find in favor of 4 Ms. Tate on one or more of her other claims, you 5 should award her an amount of money that the 6 greater weight of the evidence shows will fairly 7 and adequately compensate her for her loss, injury 8 or damage, including any damage that she is 9 reasonably certain to incur or experience in the 10 future. You shall consider the following elements: 11 Any bodily injury sustained by Ms. Tate and 12 any resulting pain and suffering, disability or 13 physical impairment, mental anguish, inconvenience 14 or loss of capacity for the enjoyment of life 15 experienced in the past or to be experienced in the 16 future. 17 Now, there is no exact standard for measuring 18 this type of damage. The amount should be fair and 19 just in light of the evidence. 20 In determining the total amount of damages, 21 you should not make any reduction because of the 22 responsibility that you charge to Ms. Tate. I will 23 enter a judgment based on your verdict. And in 24 entering that judgment, I will reduce the total 25 amount of damages by the percentage of</p>	<p>1 If you find in Ms. Tate's favor on one or more 2 of these claims, then you should consider whether, 3 in addition to compensatory damages, punitive 4 damages are warranted against Philip Morris USA in 5 the circumstances of this case as punishment for 6 conduct causing Ms. Tate's loss, injury or damage 7 and as a deterrent to others. 8 Any such damages would be in addition to any 9 compensatory damages that you may award. The 10 burden on Ms. Tate to prove this issue is by clear 11 and convincing evidence as to this defendant. 12 You may not find the punitive damages are 13 warranted against Philip Morris based upon 14 Ellen Tate's claims for negligence or product 15 defect. 16 Punitive damages are warranted if you find by 17 clear and convincing evidence that Philip Morris 18 USA's conduct causing loss, injury or damage to 19 Ms. Tate was so gross and flagrant as to show a 20 reckless disregard of human life or for the safety 21 of Ellen Tate; or Philip Morris USA's conduct 22 showed such an entire lack of care that a 23 high-ranking official of Philip Morris USA must 24 have been consciously indifferent to the 25 consequences; or Philip Morris USA's conduct showed</p>

6 (Pages 2319 to 2322)

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1 such an entire lack of care that Philip Morris USA
2 must have wantonly or recklessly disregarded the
3 safety and welfare of the public; or Philip Morris
4 USA's conduct showed such reckless indifference to
5 the rights of Ellen Tate as to be equivalent to an
6 intentional violation of those rights.

7 Now, with regard to a definition of clear and
8 convincing evidence, it differs from greater weight
9 of the evidence, in that it is more compelling and
10 persuasive. As I've already instructed you,
11 greater weight of the evidence means the more
12 persuasive and convincing force and effect of the
13 entire evidence in the case.

14 In contrast, clear and convincing evidence is
15 evidence that is precise, explicit, lacking in
16 confusion, and of such great weight that it
17 produces a firm belief or conviction without
18 hesitation about the matter in issue.

19 For purposes of determining whether the
20 plaintiff, Ms. Tate, is entitled to punitive
21 damages or, if so, the amount of punitive damages,
22 you may not consider in any way the findings
23 regarding Philip Morris USA's conduct from the
24 prior lawsuit that I described to you earlier.

25 You've heard evidence concerning harms

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1 suffered by persons who are not parties to this
2 case. You may not award punitive damages on behalf
3 of those other individuals. Any punitive damages
4 you award must represent the punishment you deem
5 appropriate for causing Ms. Tate's injuries. Other
6 individuals who have been harmed can bring their
7 own suits and seek compensatory and punitive
8 damages in their own right.

9 In determining whether punitive damages are
10 warranted and, if so, in determining the amount of
11 any such damages, you may not seek to punish
12 Philip Morris USA for any harms inflicted upon
13 Ms. Tate except those caused by Philip Morris'
14 punishable conduct.

15 Conduct that is incident to a proper response
16 to litigation, whether in the courtroom or outside
17 of it, is accorded legal protection. Actions taken
18 solely to defend against litigation cannot form a
19 basis on which to impose punitive damages in this
20 action.

21 If you decide that punitive damages are
22 warranted against Philip Morris USA, you will
23 decide the amount of punitive damages, if any, to
24 be assessed as punishment and as a deterrent to
25 others. This amount will be in addition to the

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1 compensatory damages that you previously awarded.

2 In making this determination, you should
3 consider the following: First, the nature, extent
4 and degree of misconduct and the related
5 circumstances. You may not, however, impose
6 punitive damages to punish Philip Morris USA for
7 harms caused to others whose cases are not before
8 you. You may punish Philip Morris USA only for
9 harm done to Ms. Tate by the specific conduct that
10 formed the basis for your finding that punitive
11 damages are warranted.

12 Next: The conduct and actions of others,
13 including Ellen Tate, any fault you attribute to
14 Ms. Tate.

15 And you shall consider the extent to which
16 Philip Morris USA's conduct has changed from the
17 conduct on which you based your determination that
18 punitive damages were warranted and the extent to
19 which circumstances have changed.

20 However, you may not award an amount that
21 would financially destroy Philip Morris USA.

22 And you may in your discretion decline to
23 assess punitive damages.

24 If you decide to award punitive damages, the
25 amount should be no greater than the amount that

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1 you find necessary to punish Philip Morris USA for
2 the harm caused to Ms. Tate and to deter
3 Philip Morris and others similarly situated from
4 engaging in such misconduct in the future.

5 In determining whether punitive damages are
6 warranted and, if so, in determining the amount of
7 any such damages, you may not seek to punish
8 Philip Morris USA for any conduct to the extent
9 that it produced harms or had effect outside the
10 State of Florida.

11 You should also take into consideration any
12 mitigating evidence. Mitigating evidence is
13 evidence which may demonstrate that there is no
14 need for punitive damages or that a reduced amount
15 of punitive damages should be imposed against
16 Philip Morris USA.

17 In considering whether the conduct causing
18 damage to Ms. Tate warrants punitive damages and,
19 if so, in what amount, you should evaluate that
20 conduct in relation to the conduct and actions of
21 others, including Ms. Tate, and the fault that you
22 attribute to Ms. Tate. You should not consider
23 Philip Morris USA's conduct in the abstract.

24 Now, members of the jury, you have now heard
25 all of my instructions to you on the law, you've

7 (Pages 2323 to 2326)

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

COMPLEX CIVIL DIVISION

CASE NO. 08-80000(19)

JUDGE JEFFREY E. STREITFELD

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Pertains to: COHEN, 2007-CV 11515(19)

VOLUME 25 - Pages 2957 to 3133

The above entitled cause came on for jury trial
before the Honorable Jeffrey E. Streitfeld, Judge of
the above styled court, on Tuesday, March 23, 2010,
at the Broward County Courthouse, 201 S.E. 6th
Street, Room 970, Fort Lauderdale, Florida,
commencing at 9:00 a.m.

Reported by: Kimberly Fontalvo, RPR, CLNR,
Notary Public, State of Florida

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1 detriment on a statement that he received from
2 a Defendant, that concealed or omitted material
3 information about the health effects or
4 addictive nature of smoking, or you find that
5 Mr. Cohen reasonably relied to his detriment on
6 a statement made in furtherance of a
7 Defendant's agreement to conceal or omit
8 material information, and such reliance was a
9 legal cause of Nathan Cohen's death.

10 If you find in favor of the Plaintiff,
11 Mrs. Cohen, on one of these claims as to a
12 Defendant, then you should consider whether in
13 addition to compensatory damages, punitive
14 damages are warranted against that Defendant in
15 the circumstances of this case as punishment
16 for conduct causing Mr. Cohen's death and as a
17 deterrent to others.

18 Punitive damages are warranted against a
19 Defendant if you find by clear and convincing
20 evidence that the conduct causing damage to
21 Nathan Cohen was so gross and flagrant as to
22 show a reckless disregard of the safety of
23 Nathan Cohen, or the conduct causing damage to
24 Nathan Cohen showed such an entire lack of care
25 that a high ranking official of the Defendant

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1 For purposes of determining whether
2 Mrs. Cohen is entitled to punitive damages or
3 if so the amount of punitive damages, you may
4 not consider in any way the findings regarding
5 the Defendants' conduct from the prior lawsuit
6 that I described to you earlier.

7 In determining whether punitive damages
8 are warranted and if so in determining the
9 amount of any such damages, you may not seek to
10 punish a Defendant for any harms suffered by
11 any persons other than Nathan Cohen.

12 In determining whether punitive damages
13 are warranted against the Defendant and if so
14 in determining the amount of any such damages,
15 you may not seek to punish a Defendant for any
16 harm inflicted upon Nathan Cohen, except those
17 caused by that Defendant's punishable conduct.

18 Conduct that is incident to a proper
19 response to litigation, whether in the
20 courtroom or outside of it, is afforded legal
21 protection. Actions taken solely to defend
22 against litigation cannot form a basis on which
23 to impose punitive damages in this action.

24 If you find that punitive damages are
25 warranted against a Defendant, you will

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1 must have been consciously indifferent to the
2 consequences to Nathan Cohen, or the conduct
3 causing damage to Nathan Cohen showed such an
4 entire lack of care that a high ranking
5 official of the Defendant must have wantonly or
6 recklessly disregarded the safety and welfare
7 of Nathan Cohen, or the conduct showed such
8 reckless indifference to the rights of Nathan
9 Cohen as to be equivalent to an intentional
10 violation of those rights.

11 Now, you will notice that with some
12 emphasis I mentioned these issues are to be
13 decided by clear and convincing evidence.
14 Clear and convincing evidence differs from the
15 greater weight of the evidence in that it is
16 more compelling and persuasive.

17 As I've told you, greater weight of the
18 evidence means the more the more persuasive and
19 convincing force and effect of the entire
20 evidence in this case.

21 In contrast, clear and convincing evidence
22 is evidence that is precise, explicit, lacking
23 in confusion, and of such weight that it
24 produces a firm belief or conviction without
25 hesitation about the matter in issue.

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1 determine by the greater weight of the evidence
2 the amount of punitive damages, if any, to be
3 assessed against that Defendant as punishment
4 and as a deterrent to others. This amount will
5 be in addition to the compensatory damages you
6 previously have awarded.

7 In making this determination, you should
8 consider the nature, degree and extent of this
9 conduct and the related circumstances. You may
10 not, however, impose punitive damages to punish
11 the Defendants for harms caused to others whose
12 cases are not before you. You may punish the
13 Defendant only for harm done to Nathan Cohen by
14 the specific conduct that formed the basis for
15 your finding that punitive damages are
16 warranted.

17 You shall also consider the conduct and
18 acts of others, including Nathan Cohen, and any
19 fault that you attribute to Nathan Cohen, and
20 you should consider the extent to which the
21 Defendants' conduct has changed from the
22 conduct on which you based your determination
23 that punitive damages were warranted, and the
24 extent to which circumstances have changed.

25 You may, in your discretion, decline to

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2011-CA-005250 XXXX MB

CYNTHIA McFALL RIDLEY, as
Personal Representative of the
ESTATE OF NORBERT McFALL,
deceased,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

VOLUME 15 (Pages 1809 - 1998)

DATE TAKEN: October 17, 2018

TIME: (1:00) 12:59 p.m. - 6:27 p.m.

PLACE: Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida

BEFORE: Cymonic Rowe, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:

Gina Rodriguez, RPR, CRR, CCP

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PLAINTIFF EXHIBITS MARKED IN EVIDENCE

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1 form the percentage of fault on the part of
2 Norbert McFall and the percentage of fault, if
3 any, that you charge to R.J. Reynolds for
4 legally causing Mr. McFall's lung cancer and
5 death.

6 You have heard evidence regarding the
7 smoking history and conduct of Mr. McFall and
8 the conduct of Defendant. A party's conduct was
9 a legal cause of injuries and death if it
10 directly, and in natural and continuous
11 sequence, produced or substantially -- I'm
12 sorry -- produced or contributed substantially
13 to producing such injuries and death so that it
14 can be reasonably be said that but for the
15 conduct, the injuries and death would not have
16 occurred.

17 Your determination of Defendant's fault, if
18 any, must be based solely on the conduct by
19 Defendant that was a legal cause of Mr. McFall's
20 lung cancer and death. In making this
21 determination, you should not consider any
22 alleged conduct by Defendant if you find -- I'm
23 sorry -- any alleged conduct by Defendant that
24 you find was not a legal cause of Mr. McFall's
25 lung cancer and death.

1 If your verdict is for Defendant, you will
2 not consider the matter of damages. If,
3 however, you find for Plaintiff on one or more
4 of her claims, and you find that lung cancer was
5 a legal cause of Mr. McFall's death, then you
6 will consider only the damages available to
7 Plaintiff on her wrongful death claim.

8 In that event, you should determine and
9 write on the verdict form, in dollars, the total
10 amount of loss, injury, or damage which the
11 greater weight of the evidence shows that
12 Cynthia Ridley sustained as a result of Norbert
13 McFall's lung cancer and death.

14 In determining any damages to be awarded,
15 you shall consider certain additional elements
16 of damage for which there is no exact standard
17 for fixing the compensation to be awarded. Any
18 such award should be fair and just in light of
19 the evidence regarding the following elements:

20 The loss by Cynthia Ridley of parental
21 companionship, instruction, and guidance, and
22 her mental pain and suffering as a result of
23 Norbert McFall's lung cancer and death from the
24 date of the injury.

25 In determining the duration of those

1 losses, you may consider the joint life
2 expectancy of Norbert McFall and Cynthia Ridley
3 together with the other evidence in the case.

4 The joint life expectancy is that period of
5 time when both Norbert McFall and Cynthia Ridley
6 would have remained alive. The mortality tables
7 received in evidence may be considered, together
8 with the other evidence in this case, in
9 determining how long each may have been expected
10 to live.

11 On the other hand, if you find for
12 Plaintiff on one or more of her claims, and you
13 find that the lung -- that lung cancer was not a
14 legal cause of Mr. McFall's death, then you will
15 only consider the damages available to Plaintiff
16 on her alternative survival claim.

17 In that event, you shall determine and
18 write on the verdict form, in dollars, the total
19 amount of damages which the greater weight of
20 the evidence shows will fairly and adequately
21 compensate the estate of Norbert McFall for the
22 injuries suffered by Norbert McFall. You shall
23 consider the following evidence:

24 Any bodily injury sustained by Norbert
25 McFall, and any resulting pain and suffering

1 experienced by Norbert McFall as a result of his
2 lung cancer. There is no exact standard for
3 measuring such damage. The amount should be
4 fair and just in the light of the evidence.

5 In determining the total amount of damages
6 to Cynthia Ridley as a result of Norbert
7 McFall's lung cancer and death, you should not
8 make any reduction because of the fault of
9 Norbert McFall. The Court will enter a judgment
10 based on your verdict, and in entering judgment,
11 will reduce the total amount of damages by the
12 percentage of negligence which you find was
13 caused by Norbert McFall.

14 If you find for Plaintiff on her claims for
15 concealment and agreement to conceal, the amount
16 of compensatory damages awarded to Plaintiff
17 will not be reduced by Mr. McFall's fault, if
18 any.

19 There is an additional claim in this case
20 that you must decide. If you find for Plaintiff
21 and against Defendant, you must decide whether
22 in addition to compensatory damages, punitive
23 damages are warranted as punishment to Defendant
24 and as a deterrent to others. Any such damages
25 would be in addition to any compensatory damages

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1 you may award.

2 The trial of the punitive damages issue is
3 divided into two parts. In this first part, you
4 will decide whether the conduct of Defendant is
5 such that punitive damages are warranted. If
6 you decide that punitive damages are warranted,
7 we will proceed to the second part of that
8 issue, during which the parties may present
9 additional evidence and argument on the issue of
10 punitive damages. I will then give you
11 additional instructions, after which you will
12 decide whether, in your discretion, punitive
13 damages will be assessed, and if so, the amount.

14 The burden is on Plaintiff to prove by
15 clear and convincing evidence that punitive
16 damages may be warranted. Clear and convincing
17 evidence differs from the greater weight of the
18 evidence in that it is more compelling and
19 persuasive.

20 As I've already instructed you, greater
21 weight of the evidence means the more persuasive
22 and convincing force and effect of the entire
23 evidence in the case. In contrast, clear and
24 convincing evidence is the evidence that is
25 precise, explicit, lacking in confusion, and of

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1 such weight that it produces a firm belief or
2 conviction, without hesitation, about the matter
3 in issue.

4 Punitive damages are warranted if you find
5 by clear and convincing evidence that:

6 1. The conduct causing Norbert McFall's
7 lung cancer and death was so gross and flagrant
8 as to show a reckless disregard of human life or
9 of the safety of persons exposed to the effects
10 of such conduct;

11 Or 2. The conduct showed an entire lack of
12 care, that Defendant must have been consciously
13 indifferent to the consequences;

14 Or 3. The conduct showed an entire lack of
15 care, that Defendant must have wantonly or
16 recklessly disregarded the safety and welfare of
17 the public;

18 Or 4. The conduct showed such reckless
19 indifference to the rights of others as to be
20 equivalent to an intentional violation of those
21 rights.

22 If you find for Plaintiff and against
23 Defendant, and you also find that clear and
24 convincing evidence shows that the conduct of
25 Defendant was a substantial cause of

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1 Mr. McFall's lung cancer and death, and that
2 such conduct warrants punitive damages under the
3 standards I have given you, then in your
4 discretion you may determine punitive damages
5 are warranted against Defendant.

6 In deciding whether punitive damages are
7 warranted, you may not seek to punish Defendant
8 for any harms suffered by any individuals other
9 than Mr. McFall. However, you may consider
10 harms suffered by other persons not parties to
11 this lawsuit in assessing the reprehensibility
12 or wrongfulness of Defendant's acts. That
13 consideration must be based on the same or
14 similar conduct to that which has been shown by
15 clear and convincing evidence to have caused
16 Mr. McFall's lung cancer and death.

17 For purposes of determining whether
18 punitive damages are warranted against
19 Defendant, and if so, the amount of punitive
20 damages, you may not consider in any way the
21 findings regarding Defendant's conduct that I
22 described earlier.

23 In determining whether punitive damages are
24 warranted, you may also take into consideration
25 any mitigating evidence. Mitigating evidence is

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1 evidence which may demonstrate there is no need
2 to impose punitive damages against Defendant.

3 That is the law you must follow in deciding
4 the case. The attorneys for the parties will
5 now present their final arguments. When they
6 are through, I will have some final instructions
7 about your deliberations.

8 The parties each have equal time.
9 Plaintiff begins first, and he also has an
10 opportunity to present rebuttal argument if he
11 chooses.

12 Mr. Kaiser, you may proceed.

13 CLOSING STATEMENT

14 MR. KAISER: May it please the Court,
15 Counsel. Ladies and gentlemen of the jury, good
16 afternoon.

17 We thank people who serve in the military
18 for their service, and we thank people who serve
19 on a jury for their service, and I thank you all
20 for your service. We appreciate your
21 attentiveness, your time, and without your
22 service we wouldn't have the system that we have
23 at work. So thank you very much.

24 What I want to do is move the podium.

25 We started off it seems like weeks ago with

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2016 CA 008532 XXXX MB

JULIE ADAMSON, as Personal
Representative of the Estate of
JACKLYN ADAMSON,
Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
VOLUME 10 (Pages 2532 - 2981)

DATE TAKEN: November 20, 2017

TIME: 8:38 a.m. - 7:04 p.m.

PLACE: Palm Beach County Courthouse
205 N. Dixie Highway
Courtroom 9C

BEFORE: MEENU SASSER, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:
Gina Rodriguez, RPR, CRR, CCP

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1 Q. Let's go to June 8th. Brain scan and bone
2 scan. Is this standard workup when someone is
3 diagnosed with cancer in their lung?

4 A. Yes, it can be. And this would be looking
5 for if she had metastatic cancer to an area. So it's
6 thinking that if this is a lung cancer, has it spread
7 to either brain or bone.

8 Q. And is that because the brain and the bone
9 are typical places for metastases from the lung
10 versus primary sites to metastasize to the lung?

11 A. Yes, it is.

12 Q. So at this point in time, do we have any
13 evidence that doctors are looking for other possible
14 primary sites?

15 A. No.

16 Q. Do we have any information about what
17 doctor actually ordered these scans?

18 A. We don't.

19 Q. Any indication here that they did a
20 mammogram or a breast MRI to look for breast cancer?

21 A. There is none.

22 Q. Would a primary breast cancer have shown up
23 on a chest x-ray or CT scan?

24 A. Probably not.

25 Q. Do young women tend to have benign fibrous

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1 be up to 67 percent?

2 A. Some published work is that, yes.

3 MS. BARNETT: Your Honor, I object. That's
4 not his work.

5 THE COURT: No speaking objections.
6 Sidebar, please.

7 (Sidebar discussion held.)

8 THE COURT: What's your objection?

9 MS. BARNETT: If this is some published
10 study that he's relying on and testifying about
11 that was never disclosed to us, this is why I
12 tried to raise this issue ahead of time. It's
13 something that he wrote, I am going to ask him
14 to tell me every document --

15 THE COURT: Have you found any studies?

16 MS. SCHNEIDER: Your Honor, he does
17 literature reviews and he publishes actually on
18 finding -- his findings of other studies. So it
19 was my impression when I talked to him that this
20 was part of his work.

21 THE COURT: So it's a literature review,
22 it's not his own study?

23 MS. SCHNEIDER: I think it's a part of his
24 published work. I don't -- I'm not certain --

25 THE COURT: You need to clarify that it is

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1 tissue in their breast that could make it harder to
2 detect a malignancy?

3 A. On mammography, yes.

4 Q. Are you familiar with the errors rates for
5 mammograms?

6 A. Yes.

7 Q. And have you actually studied that,
8 Dr. Raab?

9 A. Yes.

10 Q. What have you found as the reason for the
11 error rate being so high for mammograms?

12 A. Well, it's the -- it's -- one of the main
13 things like pathology having poor samples, is that
14 poor scans can actually be misinterpreted, as well as
15 that the level of tumor can be difficult to separate
16 from the level of surrounding tissue in women who
17 have fibrous tissue of the breast.

18 Q. And what's the actual error rate that
19 you've found at the institutions you have looked at
20 for mammograms?

21 A. Well, I would say that again it's probably
22 similar to what we see in the rest of medicine, you
23 know, 20 percent or higher of disagreements of
24 radiologists looking at it.

25 Q. Have you found in one study that it could

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1 literature review, then.

2 MS. BARNETT: And also, Your Honor, I asked
3 him --

4 MS. SCHNEIDER: Well, I don't know, but I
5 will clarify.

6 MS. BARNETT: Your Honor, he's got 300
7 publications on his CV. And so I asked him in
8 his deposition for all the publications that
9 were related to his opinions. And there's
10 nothing about this with breast cancer, he didn't
11 flag it, he didn't tell me that was part of it.
12 This isn't something that was discussed. It is
13 a new opinion.

14 THE COURT: New opinion and --

15 MS. SCHNEIDER: I don't agree, Your Honor.

16 THE COURT: Was this discussed in
17 deposition, disclosed?

18 MS. SCHNEIDER: Well, I mean, all of his
19 work was discussed.

20 THE COURT: Was this disclosed?

21 MS. SCHNEIDER: I don't know if she asked
22 specifically this information. I mean, he
23 talked about error rates.

24 THE COURT: She said she did.

25 MS. SCHNEIDER: You asked about the error

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1 rate in mammograms?

2 MS. BARNETT: We didn't talk about the
3 error rate in mammograms or this study.

4 MS. SCHNEIDER: She asked about what
5 publications related to diagnosing lung cancer.

6 THE COURT: Did you ask about what
7 publications went to his opinions?

8 MS. BARNETT: Yes, yes, I did.

9 MS. SCHNEIDER: If I can see the
10 deposition.

11 THE COURT: Show Ms. Schneider then. The
12 objection will be sustained otherwise. Okay.
13 (Sidebar concluded.)

14 BY MS. SCHNEIDER:

15 Q. In your experience, your own personal
16 experience with research you've done and your work as
17 a pathologist, are you familiar with the issue that
18 breast cancer is maybe more difficult to detect in
19 heavier women?

20 A. Yes.

21 Q. Now, would a gynecological cancer have
22 shown up in any of the tests they performed at this
23 time?

24 A. No.

25 Q. What do we know about what the brain scan

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1 jurors a quick five-minute stretch break, and
2 then we'll continue. Thank you all.

3 (Jurors exited the courtroom.)

4 MS. BARNETT: I thought this was resolved.
5 Maybe this isn't resolved. I mean, this is why
6 I raised this this morning, this unpublished
7 work that isn't out there that we haven't had a
8 chance to read, to understand.

9 THE COURT: My question was was it covered
10 in the deposition or not?

11 MS. SCHNEIDER: It was covered, Your Honor,
12 in the deposition when she asked. Is there
13 anything else relevant to your opinions?

14 He said: There's a slide show that's
15 related to my work.

16 Your Honor, when we were talking this
17 morning, she was mentioning specific statistics
18 about diagnosing lung cancer.

19 THE COURT: And the 67 percent came up and
20 Plaintiff's counsel had access to that?

21 MS. SCHNEIDER: Well, I sent her the slide
22 show.

23 THE COURT: But that was after the
24 deposition. So how can he testify about
25 something that wasn't produced at the time of

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1 and bone scan showed?

2 A. We don't.

3 Q. Let's go to June 9th. It says:
4 Dr. Scheerer, 6:30 p.m. Is Dr. Scheerer a surgeon?

5 A. Yes, he is.

6 Q. And do we have any records from
7 Dr. Scheerer?

8 A. We don't.

9 MS. BARNETT: Your Honor, may we approach?

10 THE COURT: Sure.

11 (Sidebar discussion held.)

12 MS. SCHNEIDER: I just remembered,
13 Your Honor, this ties directly to breast cancer.
14 I think our point that they discussed in the
15 deposition. And it has the mammogram diagnostic
16 rate, 67 percent.

17 MS. BARNETT: This deposition you sent me
18 this --

19 MS. SCHNEIDER: He discussed this, he
20 discussed the --

21 THE COURT: I will give the jurors a quick
22 five-minute break. Why don't we find it in
23 deposition then, okay.

24 (Sidebar concluded.)

25 THE COURT: Deputy, we're going to give the

Page 2831

1 deposition? She wouldn't get a chance to ask
2 him, that's not fair.

3 MS. SCHNEIDER: That's fine, Your Honor.
4 I'm not going back there. I'm just, I mean,
5 he's able to talk generally about the
6 mammograms. I'm not going to go back to the
7 67 percent, Your Honor. It was my
8 misunderstanding. I didn't realize that this is
9 where it came from. He just told me generally
10 when we were prepping. I apologize.

11 THE COURT: No problem. Plaintiff's
12 objection is sustained.

13 Let's bring the jurors in, Chris.

14 (Recess was held from 4:18 p.m. until
15 4:24 p.m.)

16 THE COURT: Welcome back, everyone. Thank
17 you so much.

18 You may continue with direct examination.

19 MS. SCHNEIDER: Thank you, Your Honor,
20 jurors.

21 BY MS. SCHNEIDER:

22 Q. Where we left off, Dr. Raab, was talking
23 about Dr. Scheerer, who is the surgeon. Now, what's
24 the most likely reason at this point in time, given
25 your knowledge and experience of the diagnostic

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 12-29000 CA 31

JOYCE HARDIN, as Personal
Representative of the Estate of
THOMAS B. HARDIN, deceased,
Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.TRANSCRIPT OF JURY TRIAL PROCEEDINGS
VOLUME 16 (Pages 1639 - 1784)

DATE TAKEN: February 13, 2018

TIME: 1:32 p.m.

PLACE: Miami-Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
6-3

BEFORE: SPENCER EIG, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:
Gina Rodriguez, RPR, CRR, CCP

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Tina Lollie

Michelle Acebal

Ryan Morrison

DEFENSE EXHIBITS MARKED IN EVIDENCE

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1 advertise its products. Advertising is
2 commercial speech that is protected by the First
3 Amendment to the United States Constitution.

4 Accordingly, you may not punish
5 R.J. Reynolds based merely on the fact that
6 R.J. Reynolds advertised its products.

7 In this case, you must decide as to
8 R.J. Reynolds whether, in addition to the
9 compensatory damages that a previous jury
10 awarded to the Plaintiff, punitive damages are
11 warranted against R.J. Reynolds under the
12 circumstances of this case as punishment to
13 R.J. Reynolds and as a deterrent to others.

14 This trial on punitive damages is divided
15 in two parts. In the first part that we've done
16 now, you will decide whether the conduct of
17 R.J. Reynolds that gives rise to Plaintiff's
18 claims for defective product and negligence is
19 such that punitive damages are warranted.

20 If you decide punitive damages are
21 warranted, we will proceed to a second part of
22 that issue, during which the parties may present
23 additional evidence and argument on the issue of
24 the quantity of punitive damages.

25 I will then give you additional legal

1 probability of injury to Thomas Hardin and,
2 despite that knowledge, R.J. Reynolds
3 intentionally pursued that course of conduct
4 resulting in injury.

5 Gross negligence means that R.J. Reynolds'
6 conduct was so reckless or wanting in care that
7 it constituted a conscious disregard or
8 indifference to the life, safety, or rights of
9 such persons exposed to such conduct.

10 Clear and convincing evidence is evidence
11 that is precise, explicit, lacking in confusion
12 and of such weight that it produces a firm
13 conviction -- a firm belief or conviction
14 without hesitation about the matter in issue.

15 When considering whether to award punitive
16 damages, you may consider any harm R.J. Reynolds
17 caused Thomas Hardin as a result of its
18 defective product and negligence.

19 In determining whether punitive damages are
20 warranted, you may not seek to punish
21 R.J. Reynolds for any harm suffered by any
22 individuals other than Thomas B. Hardin.

23 You may only consider evidence concerning
24 harms allegedly suffered by persons who are not
25 parties to this case for the limited purpose of

1 instructions, after which you will decide
2 whether, in your discretion, punitive damages
3 will be assessed, and, if so, the amount.

4 Plaintiff claims that punitive damages
5 should be awarded against R.J. Reynolds for its
6 conduct underlying Plaintiff's claims for
7 defective product and negligence in causing
8 Thomas Hardin's COPD and death.

9 Punitive damages are warranted against
10 R.J. Reynolds if you find by clear and
11 convincing evidence that R.J. Reynolds was
12 guilty of intentional misconduct or gross
13 negligence related to Plaintiff's claims of
14 defective product and negligence, which was a
15 substantial cause of Thomas Hardin's COPD and
16 death.

17 Under those circumstances, you may in your
18 discretion award punitive damages against
19 R.J. Reynolds.

20 If clear and convincing evidence does not
21 show such conduct by R.J. Reynolds, punitive
22 damages are not warranted against R.J. Reynolds.

23 Intentional misconduct means that
24 R.J. Reynolds had actual knowledge of the
25 wrongfulness of the conduct and there was a high

1 reprehensibility of R.J. Reynolds' conduct.

2 You may only consider evidence regarding
3 conduct that allegedly caused harm to persons
4 other than Mr. Hardin to the extent that it was
5 substantially similar to the specific conduct
6 that actually caused Mr. Hardin's COPD and
7 death, such that it essentially replicated that
8 conduct.

9 In determining whether punitive damages are
10 warranted, you may also take into consideration
11 any mitigating evidence. Mitigating evidence is
12 evidence that may demonstrate that there is no
13 need to impose punitive damages.

14 This is the law that you must follow in
15 deciding this case.

16 The attorneys for the parties will now
17 present their final arguments.

18 Well, we're not going to do that today, and
19 we're going to do that tomorrow. And so this
20 last part of the instructions on pages 17
21 through 19 is not for now. I'll read that part
22 to you tomorrow after we hear the closing
23 arguments in the morning.

24 Ladies -- madam and gentlemen of the jury,
25 so that's all we're going to do for today. We

1 IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
2 IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA
3 CIRCUIT CIVIL DIVISION

4 CASE NO. 10-54813 CA (15)

5 CHARLES G. WENDEL, as Personal
6 Representative of the Estate of CAROL
7 WENDEL, deceased,

8 Plaintiff,

9 vs.

10 R.J. REYNOLDS TOBACCO COMPANY, et al.,

11 Defendants.

12 -----/

13 JURY TRIAL BEFORE THE HONORABLE
14 JOSE M. RODRIGUEZ
15 CIRCUIT COURT JUDGE

16 (Volume 22)

17 Pages 2760 to 2921

18 Thursday, February 20, 2014
19 9:16 a.m. - 2:39 p.m.

20 Miami-Dade County Courthouse
21 73 West Flagler Street
22 Courtroom 4-1
23 Miami, Florida 33130

24 STENOGRAPHICALLY REPORTED BY:
25 NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R.
Certificate in Realtime Systems Administration
Certified Realtime Reporter
Registered Professional Reporter
Florida Professional Reporter

2841	2843
<p>1 In determining the duration of the losses, you 2 may consider the joint life expectancy of Charles 3 Wendel and Carol Wendel together with the other 4 evidence in the case.</p> <p>5 In determining the total amount of damages, 6 you should not make any reduction because of the 7 fault of Carol Wendel. The Court will enter a 8 judgment based on your verdict and, if you find 9 that Carol Wendel was at fault, the Court in 10 entering judgment will reduce the amount of damages 11 by the percentage of fault which you find was 12 caused by Carol Wendel.</p> <p>13 There is an additional claim in this case that 14 you must decide. If you find for Charles Wendel 15 and against R.J. Reynolds, you must decide whether, 16 in addition to compensatory damages, punitive 17 damages are warranted as punishment to R.J. 18 Reynolds and as a deterrent to others.</p> <p>19 The trial of the punitive damages issue is 20 divided into two parts. In the first part, you 21 will decide whether the conduct of R.J. Reynolds is 22 such that punitive damages are warranted. If you 23 decide that punitive damages are warranted, we will 24 proceed to the second part of that issue during 25 which the parties may present additional evidence</p>	<p>1 Carol Wendel.</p> <p>2 Under those circumstances, you may, in your 3 discretion, award punitive damages against R.J. 4 Reynolds. If clear and convincing evidence does 5 not show such conduct by R.J. Reynolds, punitive 6 damages are not warranted against R.J. Reynolds.</p> <p>7 "Intentional misconduct" means that R.J. 8 Reynolds had actual knowledge of the wrongfulness 9 of the conduct and there was a high probability of 10 injury or damage to Carol Wendel and, despite that 11 knowledge, R.J. Reynolds intentionally pursued that 12 course of conduct, resulting in injury or damage.</p> <p>13 "Gross negligence" means that R.J. Reynolds 14 was so reckless or wanting in care that it 15 constituted a conscious disregard or indifference 16 to life, safety, or rights of persons exposed to 17 such conduct.</p> <p>18 "Clear and convincing evidence" differs from 19 the "greater weight of the evidence" in that it is 20 more compelling and persuasive. As I have already 21 instructed you, "greater weight of the evidence" 22 means the more persuasive and convincing force and 23 effect of the entire evidence in the case.</p> <p>24 For the purpose of determining whether 25 punitive damages are warranted, you may not</p>
2842	2844
<p>1 and argument on the issue of damages.</p> <p>2 I will then give you additional instructions, 3 after which you will decide whether, in your 4 discretion, punitive damages will be assessed and, 5 if so, the amount.</p> <p>6 Charles Wendel's claim is that punitive 7 damages should be awarded against R.J. Reynolds for 8 its conduct in, 1, placing cigarettes on the market 9 that were defective and unreasonably dangerous; 2, 10 concealing and omitting material information not 11 otherwise known or available knowing that the 12 material was false or misleading or failing to 13 disclose a material fact concerning the health 14 effects or addictive nature of smoking cigarettes 15 or both; and, 3, agreeing to conceal or omit 16 information regarding the health effects of 17 cigarettes or their addictive nature with the 18 intention that smokers and the public would rely on 19 this information to their detriment; and, 4, 20 negligence.</p> <p>21 Punitive damages are warranted against R.J. 22 Reynolds if you find by clear and convincing 23 evidence that Reynolds was guilty of intentional 24 misconduct or gross negligence, which was a 25 substantial cause of loss, injury, or damage to</p>	<p>1 consider in any way the Engle findings regarding 2 R.J. Reynolds' conduct for the prior -- for the 3 prior trial that I have described to you earlier.</p> <p>4 In determining whether punitive damages are 5 warranted, you may not seek to punish R.J. Reynolds 6 for any harm suffered by any individual -- 7 individuals other than Carol Wendel.</p> <p>8 You may consider evidence concerning harms 9 allegedly suffered by persons who are not parties 10 to this cause for the limited purpose of any light 11 it might shed on the degree of reprehensibility or 12 wrongfulness of R.J. Reynolds' conduct that caused 13 Carol Wendel's lung cancer and death.</p> <p>14 You may consider evidence regarding conduct 15 that allegedly caused harm to persons other than 16 Carol Wendel only to the extent that it was 17 substantially similar to the specific conduct that 18 actually caused Carol Wendel's lung cancer and 19 death, such that it essentially replicated that 20 conduct.</p> <p>21 Your consideration of whether punitive damages 22 are warranted for R.J. Reynolds' conduct must be 23 based on conduct which has been shown by clear and 24 convincing evidence to cause -- to have caused 25 Carol Wendel's lung cancer and death.</p>

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 08-00113-CA-31

MIRTHA LEDO, as Personal Representative
for the Estate of JOSE LEDO, deceased,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.

Defendants.

JURY TRIAL
PROCEEDINGS BEFORE THE HONORABLE MIGNA SANCHEZ-LLORENS
VOLUME 16
Pages 2152 to 2351

Miami-Dade County Courthouse
73 West Flagler Street
Courtroom 6-2
Miami, Florida
11:02 a.m. - 6:54 p.m.
Tuesday, November 1, 2016

Reported by:

Tracey S. LoCastro, RPR, FPR

TLS Reporting Inc.

www.tlsreporting.com

1 fault of Mr. Ledo.

2 If your verdict is for RJ Reynolds, you will
3 not consider the matter of damages. But if the
4 greater weight of the evidence supports one or
5 more of plaintiff's claims, you should determine
6 and write on the verdict form, in dollars, the
7 total amount of damages which the greater weight
8 of the evidence shows that plaintiff sustained
9 as a result of Mr. Ledo's laryngeal cancer, and
10 death.

11 The damages you award should be fair and
12 just in light of the evidence regarding the
13 following elements and no others:

14 One, Mirtha Ledo's loss of José Ledo's
15 companionship, and protection, and her mental
16 pain and suffering as a result of Mr. Ledo's
17 injury and death.

18 Two, the loss of Carlos Ledo of parental
19 companionship, instruction and guidance, and his
20 mental pain and suffering as a result of José
21 Ledo's injury and death.

22 You may not award any other elements of
23 damages.

24 In determining the total amount of damages,
25 if any, to be awarded, you should not make any

1 RJ Reynolds and as a deterrent to others. Any
2 such damages would be in addition to any
3 compensatory damages you may award.

4 The trial of the punitive damages claim is
5 divided into two parts. In the first part, you
6 will decide whether the conduct on which you
7 based your findings that RJ Reynolds is liable,
8 if at all, on plaintiff's claims for negligent
9 design and/or design defect was such that
10 punitive damages may be warranted. You may not
11 impose punitive damages on RJ Reynolds on the
12 basis of plaintiff's claims for fraud by
13 concealment or conspiracy to fraudulently
14 conceal.

15 If you decide punitive damages are
16 warranted, we will proceed to a second part on
17 that issue during which the parties may present
18 additional evidence and argument on the issue of
19 punitive damages. I will then give you
20 additional legal instructions, after which you
21 will decide whether, in your discretion,
22 punitive damages will be assessed and, if so,
23 the amount. You may, in your discretion,
24 decline to assess punitive damages.

25 The burden is on the plaintiff to prove by

1 reduction because of the fault you have charged
2 to José Ledo. The Court will enter a judgment
3 based on your verdict and, in entering judgment,
4 will reduce the total amount of damages by the
5 percentage of fault which you find is chargeable
6 to José Ledo.

7 You may not award any damages for pain and
8 suffering of José Ledo. Such damages are not
9 recoverable in a wrongful death action.
10 Instead, plaintiff is seeking damages for Mirtha
11 Ledo and Carlos Ledo's pain, suffering and loss.

12 The purpose of an award of compensatory
13 damages is not to punish or penalize RJ Reynolds
14 for its conduct or to make an example of
15 RJ Reynolds for the public good. In determining
16 the amount of damages to award, if any, you may
17 consider only the amount necessary to compensate
18 for actual loss resulting from RJ Reynolds'
19 conduct that you found to have caused Mr. Ledo's
20 laryngeal cancer and death, if any.

21 If you find for plaintiff and against
22 RJ Reynolds, you must then decide whether, in
23 addition to compensatory damages, punitive
24 damages may be awarded against RJ Reynolds in
25 the circumstances of this case as punishment to

1 clear and convincing evidence that punitive
2 damages may be warranted. "Clear and convincing
3 evidence" differs from the "greater weight of
4 the evidence" in that it is more compelling and
5 persuasive.

6 As I've already instructed you, "greater
7 weight of the evidence" means the more
8 persuasive and convincing force and effect of
9 the entire evidence in the case. In contrast,
10 clear and convincing evidence is evidence that
11 is precise, explicit, lacking confusion, and of
12 such weight that it produces a firm belief or
13 conviction, without hesitation, about the matter
14 in issue.

15 Punitive damages may be imposed on RJ
16 Reynolds only on the basis of plaintiff's claims
17 for negligent design or design defect.

18 A product is defective if, by reason of its
19 design, the product is in a condition
20 unreasonably dangerous to the user and the
21 product is expected to and does reach the user
22 without substantial change affecting that
23 condition. A product is unreasonably dangerous
24 because of its design if the product fails to
25 perform as safely as an ordinary consumer would

1 IN THE CIRCUIT COURT OF THE
2 ELEVENTH JUDICIAL CIRCUIT
3 IN AND FOR MIAMI-DADE COUNTY, FLORIDA
4 CASE NO. 10-60768 CA 20

5 RACHEL BAUM, as Personal
6 Representative of the
7 Estate of PAUL BAUM, deceased,
8 Plaintiff,

9 vs.

10 R.J. REYNOLDS TOBACCO COMPANY, et al.,
11 Defendants.

-----x

12
13
14 V O L U M E 27
15 (Pages 3419 to 3534)

16
17 The above-styled cause came on for hearing
18 before the Honorable RONALD DRESNICK, Judge of the
19 above-styled court, at the Miami-Dade County
20 Courthouse, 73 West Flagler Street, Miami, Florida,
21 on Thursday, September 4, 2014, commencing at
22 9:20 a.m.

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1 of Mr. Baum's COPD.

2 In making this determination, you should not
3 consider any alleged conduct by any defendant that
4 you find was not a legal cause of Mr. Baum's COPD.

5 It is the plaintiff's burden to prove by the
6 greater weight of the evidence that each defendant
7 bears some fault for legally causing Mr. Baum's
8 COPD to some degree, and if so, the percentage of
9 any such fault.

10 You should, therefore, assign to each
11 defendant only such share of fault as the plaintiff
12 has demonstrated to be appropriate.

13 This instruction applies even if you have
14 determined that Mr. Baum's death was legally caused
15 by COPD caused by an addiction to smoking
16 cigarettes containing nicotine.

17 If your verdict is for all defendants on all
18 claims, you will not consider the matter of
19 damages. But if your verdict is for plaintiff on
20 one or more claims against one or more defendants,
21 you should determine and write on the verdict form
22 in dollars the total amount of damages that the
23 greater weight of the evidence shows that
24 Mr. Baum's surviving spouse, Rachel Baum, sustained
25 as a result of Mr. Baum's death, including any

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1 damages that she is reasonably certain to
2 experience in the future.

3 In determining any damages to be awarded to
4 plaintiff, Rachel Baum, you shall consider certain
5 elements of damages for which there is no exact
6 standard of measurement for fixing the compensation
7 to be awarded.

8 Any such award should be fair and just in
9 light of the evidence regarding Rachel Baum's loss
10 of Mr. Baum's companionship and protection and her
11 mental pain and suffering as a result of Mr. Baum's
12 death.

13 In determining the duration of such losses,
14 you may consider the joint life expectancy of
15 Rachel Baum and Paul Baum together with other
16 evidence in the case.

17 In determining the total amount of damages,
18 if any, to be awarded to Mr. Baum's surviving
19 spouse, Rachel Baum, as a result of Mr. Baum's
20 death, you should not make any reduction because of
21 the fault you have charged to Mr. Baum.

22 The Court will enter a judgment based upon
23 your verdict and in entering judgment will reduce
24 the total amount of damages by the percentage of
25 fault that you find is chargeable to Mr. Baum.

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1 In determining how long Mr. Baum would have
2 lived, had he lived out his normal life, you may
3 consider his life expectancy at the time of his
4 death.

5 The mortality tables received in evidence may
6 be considered in determining how long he may have
7 been expected to live.

8 Mortality tables are not binding upon you but
9 may be considered with other evidence in the case
10 determining -- in the case bearing on Mr. Baum's
11 health, age and physical condition before his death
12 in determining his probable length of life.

13 In determining the duration of any future
14 loss sustained by Rachel Baum by reason of death of
15 Mr. Baum, you may consider the joint life
16 expectancy of each of them.

17 The joint life expectancy is that period of
18 time when both Mr. Baum and Rachel Baum would have
19 remained alive.

20 The mortality table received in evidence may
21 be considered together with the other evidence in
22 the case in determining how long each may have been
23 expected to live.

24 This instruction applies only if you find
25 that Mr. Baum's death was not legally caused by

Page 3455

1 COPD caused by an addiction to smoking cigarettes
2 containing nicotine.

3 If your verdict is for all defendants on all
4 claims, you will not consider the matter of
5 damages. But if your verdict is for the plaintiff
6 on one or more claims against one or more
7 defendants, you shall determine and write on the
8 verdict form, in dollars, the total amount of
9 damages that the greater weight of the evidence
10 shows that Mr. Baum sustained as a result of his
11 COPD from the date of his injury to the date of his
12 death.

13 In making this determination, you shall
14 consider the following elements: Any bodily injury
15 sustained by Mr. Baum and any resulting pain and
16 suffering, disability or physical impairment,
17 disfigurement, mental anguish, inconvenience or the
18 loss of capacity for the enjoyment of life as a
19 result of his COPD.

20 Plaintiff must prove by the greater weight of
21 the evidence that the damages Mr. Baum sustained
22 are a result of his COPD and the extent of any such
23 damage.

24 There is no exact standard for measuring such
25 damage. The amount should be fair and just in

10 (Pages 3452 to 3455)

1 light of the evidence.

2 In determining the total amount of any
3 damages sustained by Mr. Baum, do not make any
4 reduction because of the fault of Mr. Baum. The
5 Court will enter a judgment based on your verdict,
6 and in entering judgment will reduce the total
7 amount of damages by the percentage of fault which
8 you find is chargeable to Mr. Baum.

9 The purpose of an award of compensatory
10 damages is not to punish or penalize a defendant
11 for its conduct or to make an example of a
12 defendant for the public good.

13 Compensatory damages are meant to compensate
14 for actual loss caused by the defendant.

15 Therefore, in determining the amount of
16 damages to award, if any, you may consider only the
17 amount necessary to compensate Rachel Baum for the
18 actual loss caused by defendants' conduct that
19 caused Mr. Baum's COPD, if any, and not the nature
20 of defendants' conduct.

21 If you find for plaintiff and against
22 defendant on plaintiff's claims for fraudulent
23 concealment or agreement to fraudulently conceal,
24 you must then decide whether in addition to
25 compensatory damages, punitive damages may be

1 awarded against that defendant in the circumstances
2 of this case as punishment to that defendant for
3 the conduct that caused Mr. Baum's COPD and as a
4 detriment to others.

5 The trial of the punitive damages issue is
6 divided into two parts. In this first part you
7 will decide whether the conduct on which you base
8 your findings that a defendant is liable, and if --
9 is liable, if at all, on plaintiff's claims for
10 fraudulent concealment or agreement to fraudulently
11 conceal was such that punitive damages may be
12 warranted.

13 If you decide that punitive damages may be
14 warranted, we will proceed to a second part of that
15 issue during which the parties may present
16 additional evidence and argument on the issue of
17 punitive damages.

18 I will then give you additional instructions
19 after which you will decide whether in your
20 determination punitive damages will be assessed,
21 and if so, the amount.

22 A defendant is subject to punitive damages
23 only if you find by clear and convincing evidence
24 that the defendant engaged in intentional
25 misconduct that was a substantial cause of

1 Mr. Baum's COPD.

2 Under those circumstances, you may, in your
3 discretion, determine that punitive damages may be
4 warranted against a defendant.

5 If clear and convincing evidence does not
6 show such conduct by a defendant, punitive damages
7 are not warranted against that defendant.

8 If punitive damages are warranted, then you
9 will, as I said, determine in a subsequent phase of
10 this trial whether punitive damages should be
11 imposed, and if so, in what amount.

12 "Intentional misconduct" means that the
13 defendant had actual knowledge of the wrongfulness
14 of the conduct and there was a high probability
15 that injury would result, and despite that
16 knowledge, intentionally pursued that course of
17 conduct resulting in Mr. Baum's COPD.

18 The burden is on the plaintiff to prove by
19 clear and convincing evidence that punitive damages
20 are warranted.

21 Clear and convincing evidence differs from
22 the greater weight of evidence -- the greater
23 weight of the evidence in that it is more
24 compelling and persuasive.

25 As I have already instructed you, greater

1 weight of the evidence means the more persuasive
2 and convincing force and effect of the entire
3 evidence in the case.

4 In contrast, clear and convincing evidence is
5 evidence that is precise, explicit, lacking in
6 confusion, and of such weight that it produces a
7 firm belief or conviction without hesitation about
8 the matter in issue.

9 For the purpose of determining whether
10 punitive damages are warranted against any
11 defendant, you may not consider in any way the
12 Engle findings regarding defendants' conduct from
13 the prior trial that I described to you earlier.

14 For purposes of deciding whether Rachel Baum
15 is entitled to punitive damages or, if so, the
16 amount of punitive damages, you may not consider in
17 any way the findings from the prior lawsuit that I
18 described to you earlier.

19 In determining whether punitive damages are
20 warranted and, if so, in determining the amount of
21 any such damages, you may not seek to punish
22 defendants for any harm suffered by any person
23 other than Rachel Baum.

24 In determining whether punitive damages are
25 warranted and, if so, in determining the amount of

<p style="text-align: right;">1856</p> <p>1 IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT 2 IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA 3 CIRCUIT CIVIL DIVISION</p> <p>4 CASE NO. 08-00649-CA-10</p> <p>5 REBECCA SANTOS, as Personal 6 Representative of the Estate of Renato 7 Santos, for the use and benefit of 8 DOLORES SANTOS, the decedent's widow, 9 Plaintiff, 10 vs. 11 R.J. REYNOLDS TOBACCO COMPANY, et al., 12 Defendants. 13 -----/</p> <p>14 JURY TRIAL BEFORE THE HONORABLE 15 JACQUELINE HOGAN SCOLA 16 CIRCUIT COURT JUDGE</p> <p>17 (Volume 13) 18 Pages 1856 to 2020</p> <p>19 Monday, August 17, 2015 20 12:28 p.m. - 6:18 p.m.</p> <p>21 Miami-Dade County Courthouse 22 73 West Flagler Street 23 Courtroom 6-1 24 Miami, Florida 33130</p> <p>25 STENOGRAPHICALLY REPORTED BY: NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R. Certificate in Realtime Systems Administration Certified Realtime Reporter Registered Professional Reporter Florida Professional Reporter</p>	<p style="text-align: right;">1858</p> <p style="text-align: center;"><u>INDEX</u></p> <p>1 Volume 13, August 17, 2015 Pages 1856 to 2020</p> <p>2</p> <p>3</p> <p>4 JURY INSTRUCTIONS 1876</p> <p>5 CLOSING STATEMENT BY MR. PARAFINCZUK 1900</p> <p>6 CLOSING STATEMENT BY MR. CARR 1911</p> <p>7 CLOSING STATEMENT BY MR. BASSETT 1929</p> <p>8 CLOSING STATEMENT BY MR. HOHNBAUM 1962</p> <p>9 REBUTTAL CLOSING STATEMENT BY MR. CARR 1984</p> <p>10 FINAL JURY INSTRUCTIONS 1990</p> <p>11</p> <p>12 MOTION FOR MISTRIAL BY DEFENSE 1905</p> <p>13 MOTION FOR MISTRIAL BY DEFENSE 1914</p> <p>14 MOTION FOR MISTRIAL BY DEFENSE 1923</p> <p>15 MOTION FOR MISTRIAL BY DEFENSE 1926</p> <p>16 JURY RETIRED TO DELIBERATE 2008</p> <p>17 REPORTER'S CERTIFICATE 2020</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">1857</p> <p>1 APPEARANCES:</p> <p>2 On Behalf of the Plaintiff</p> <p>3 JUSTIN PARAFINCZUK, ESQUIRE 4 AUSTIN CARR, ESQUIRE 5 KOCH, PARAFINCZUK & WOLF, PA. 6 110 East Broward Boulevard, Suite 1630 7 Fort Lauderdale, Florida 33301 8 954-462-8700 9 Parafinczuk@kpwlaw.com, carr@kpwlaw.com</p> <p>10 On Behalf of the Defendant R.J. Reynolds</p> <p>11 W. RANDALL BASSETT, ESQUIRE 12 CORY HOHNBAUM, ESQUIRE 13 PHILIP GREEN, ESQUIRE 14 KING & SPALDING 15 1180 Peachtree Street, N.E. 16 Atlanta, Georgia 30309 17 404-572-2494, rbassett@kslaw.com, 18 Chohnbaum@kslaw.com, pgreen@kslaw.com</p> <p>19 Also Present:</p> <p>20 Rebecca Santos</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">1859</p> <p>1 (Volume 13, resuming after recess at 2 12:28 p.m.)</p> <p>3 THE COURT: Okay, Nancy came down to get me 4 about ten minutes ago and said Mr. Urbay, our 5 second juror, approached her saying he had to 6 leave, he has an emergency. So I came out and he 7 was waiting outside my office.</p> <p>8 And he says that his son's daughter was born 9 three days ago, and he just got a call from his 10 brother that they're taking the child by helicopter 11 to Children's for emergency heart surgery. So I 12 did not inquire further, but he offered to wait 13 until you-all got back. I said I did not think it 14 would be long. He's in the jury room.</p> <p>15 So I guess the question is whether or not, I 16 mean, he's been a very wonderful juror, but I guess 17 the question will be whether or not he feels he 18 will be able to return, which he probably doesn't 19 know at this point.</p> <p>20 He wants to go to Children's to be with his 21 brother, and so I don't know if you want to bother 22 asking him whether if you want him to come back if 23 he can, whether he would be distracted by this. I 24 mean, to me, the -- well, let me hear what you-all 25 want to say.</p>

<p>1896</p> <p>1 reasonably be said that but for the conduct, the</p> <p>2 emphysema/COPD and death would not have occurred.</p> <p>3 Plaintiff admits that Mr. Santos bears some</p> <p>4 fault, but less than 100 percent of the applicable</p> <p>5 fault for causing his emphysema/COPD and death.</p> <p>6 Accordingly, you must assign some percentage of</p> <p>7 fault up to, and if you should so find, may include</p> <p>8 100 percent to Mr. Santos on your verdict form.</p> <p>9 Your determination of Reynolds' fault, if any,</p> <p>10 must be based solely on conduct that was a legal</p> <p>11 cause of Renato Santos' emphysema/COPD and death.</p> <p>12 If your verdict is for Reynolds on all claims,</p> <p>13 you will not consider the matter of damages. But</p> <p>14 if your verdict is for Plaintiff on one or more of</p> <p>15 the claims against Reynolds, you should determine</p> <p>16 and write on the verdict form, in dollars, the</p> <p>17 total amount of damages that the greater weight of</p> <p>18 the evidence shows that the estate of Mr. Santos</p> <p>19 and Mr. Santos' surviving wife, Dolores Santos,</p> <p>20 sustained as a result of Mr. Santos' death,</p> <p>21 including any damages that Dolores Santos is</p> <p>22 reasonably certain to experience in the future.</p> <p>23 In determining the damages recoverable on</p> <p>24 behalf of Renato Santos' estate, you shall consider</p> <p>25 the following elements: Medical expenses due to</p>	<p>1898</p> <p>1 Mr. Santos.</p> <p>2 In determining the duration of any future loss</p> <p>3 sustained by Dolores Santos by reason of the death</p> <p>4 of Renato Santos, you may consider the joint life</p> <p>5 expectancy of Dolores Santos and Renato Santos.</p> <p>6 The joint life expectancy is that period of</p> <p>7 time when both the decedent and a survivor would</p> <p>8 have remained alive. The mortality tables received</p> <p>9 in evidence may be considered together with the</p> <p>10 other evidence in the case in determining how long</p> <p>11 each may have been expected to live.</p> <p>12 Any amount of damages which you allow for</p> <p>13 Dolores Santos' loss of companionship and</p> <p>14 protection, and her mental pain and suffering</p> <p>15 should be reduced to its present money value and</p> <p>16 only the present money value of these future</p> <p>17 economic damages is the sum of money needed now</p> <p>18 which together with what that sum will earn in the</p> <p>19 future will compensate Dolores Santos for these</p> <p>20 losses as they are actually experienced in future</p> <p>21 years.</p> <p>22 The purpose of an award of compensatory</p> <p>23 damages is not to punish or penalize Reynolds for</p> <p>24 its conduct or to make an example of Reynolds for</p> <p>25 the public good.</p>
<p>1897</p> <p>1 Renato Santos' injury or death which have become a</p> <p>2 charge against the estate.</p> <p>3 In determining any damages to be awarded</p> <p>4 Renato Santos' personal representative for the</p> <p>5 benefit of his survivor, Dolores Santos, you shall</p> <p>6 consider the following elements: Dolores Santos'</p> <p>7 loss by reason of Renato Santos' injury and death,</p> <p>8 of Renato Santos' companionship and protection, and</p> <p>9 her mental pain and suffering as a result of his</p> <p>10 injury and death.</p> <p>11 In determining the duration of any future</p> <p>12 loss, you may consider the joint life expectancy of</p> <p>13 Dolores Santos and Renato Santos.</p> <p>14 Any damages that you find were sustained by</p> <p>15 Renato Santos' estate and by Dolores Santos shall</p> <p>16 be separately stated in your verdict.</p> <p>17 In determining the total amount of damages, if</p> <p>18 any, to be awarded to Plaintiff as a result of</p> <p>19 Mr. Santos' death, you should not make any</p> <p>20 reduction because of the fault you have charged to</p> <p>21 Mr. Santos.</p> <p>22 The Court, and that's me, will enter judgment</p> <p>23 based on your verdict and, in entering judgment,</p> <p>24 will reduce the total amount of damages by the</p> <p>25 percentage of fault which you find is chargeable to</p>	<p>1899</p> <p>1 That is the law you must follow in deciding</p> <p>2 this case.</p> <p>3 The attorneys for the parties will now present</p> <p>4 their final arguments. And when they are through,</p> <p>5 I'll have a few final instructions about your</p> <p>6 deliberation.</p> <p>7 I'm going to remind you that what the lawyers</p> <p>8 say is not evidence and it's not your instructions</p> <p>9 on the law. What I have just read you is your</p> <p>10 instruction on the law, but please pay careful</p> <p>11 attention to what they are going to say as they are</p> <p>12 intending to assist you in evaluating the evidence</p> <p>13 and applying it to the law. But as I told you, you</p> <p>14 are the final determiners of what the facts are in</p> <p>15 this case.</p> <p>16 Each side is going to be given equal time.</p> <p>17 The Plaintiff is going to start and finish, because</p> <p>18 they have the burden of proof because they are the</p> <p>19 Plaintiff.</p> <p>20 Mr. Parafinczuk, Mr. Carr, are you ready to</p> <p>21 proceed?</p> <p>22 MR. PARAFINCZUK: Yes, Your Honor.</p> <p>23 THE COURT: I believe the Plaintiff is going</p> <p>24 to split their opening statement and then there is</p> <p>25 going to be a final statement, and then I believe</p>

1 IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
2 IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA
3 CIRCUIT CIVIL DIVISION
4 CASE NO. 12-29000-CA(31)
5 JOYCE HARDIN, as Personal Representative
6 of the Estate of THOMAS B. HARDIN,
7 deceased,
8 Plaintiff,
9 vs.
10 R.J. REYNOLDS TOBACCO COMPANY, et al.,
11 Defendants.

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12 JURY TRIAL BEFORE THE HONORABLE
13 MIGNA SANCHEZ-LLORENS
14 CIRCUIT COURT JUDGE

15 (Volume 29)

16 Pages 3992 to 4137

17 Tuesday, June 16, 2015
18 10:55 a.m. - 2:05 p.m.

19 Miami-Dade County Courthouse
20 73 West Flagler Street
21 Courtroom 11-1
22 Miami, Florida 33130

23 STENOGRAPHICALLY REPORTED BY:
24 NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R.
25 Certificate in Realtime Systems Administration
 Certified Realtime Reporter
 Registered Professional Reporter
 Florida Professional Reporter

Page 4025	Page 4027
<p>1 any, must be based on -- solely on conduct by 2 Reynolds, if any, that Plaintiff has proven was a 3 legal cause of Thomas Hardin's COPD/emphysema and 4 death. 5 28. This instruction applies only if you have 6 determined that Mr. Hardin's death was legally 7 caused by chronic obstructive pulmonary disease 8 ("COPD")/emphysema caused by an addiction to 9 smoking cigarettes containing nicotine. 10 If your verdict is for Reynolds on all claims, 11 you will not consider the matter of damages. But 12 if your verdict is for Plaintiff on one or more 13 claims against Reynolds, you should determine and 14 write on the verdict form, in dollars, the total 15 amount of damages that the greater weight of the 16 evidence shows that Mr. Hardin's surviving wife, 17 Joyce Hardin, sustained as a result of Mr. Hardin's 18 death, including any damages that Joyce Hardin is 19 reasonably certain to experience in the future. 20 In determining any damages to be awarded to 21 Plaintiff Joyce Hardin for her benefit, you shall 22 consider the following elements of damage and no 23 other: 24 Joyce Hardin's loss of Thomas B. Hardin's 25 companionship and protection, and Mrs. Hardin's</p>	<p>1 its conduct or to make an example of Reynolds for 2 the public good. In determining the amount of 3 damages to award, if any, you may consider only the 4 amount necessary to compensate Joyce Hardin for the 5 actual loss resulting from Reynolds' conduct that 6 you found to have caused Mr. Hardin's chronic 7 obstructive pulmonary disease ("COPD")/emphysema 8 and death, if any. 9 32. If you find for Plaintiff and against 10 Reynolds on her fraudulent concealment claim or 11 agreement to fraudulently -- fraudulently conceal 12 claim, you must then decide whether, in addition to 13 compensatory damages, punitive damages may be 14 warranted against Reynolds in the circumstances of 15 this case as punishment to Reynolds and as a 16 deterrent to others. 17 The trial of the punitive damages issue is 18 divided into two parts. In this first part, you 19 will decide whether the conduct on which you based 20 your findings that Reynolds is liable, if at all, 21 on Plaintiff's claim for fraudulent concealment or 22 agreement to fraudulently conceal was such that 23 punitive damages may be warranted. You may not 24 impose punitive damages on Reynolds on the basis of 25 Plaintiff's claims for defective product or</p>
Page 4026	Page 4028
<p>1 mental pain and suffering as a result of 2 Mr. Hardin's injury and death. In determining the 3 duration of the losses, you may consider the joint 4 life expectancy of Mr. Hardin and Mrs. Hardin 5 together with other evidence in the case. 6 You may not assess any other element of 7 damage. 8 In determining the total amount of damages, if 9 any, to be awarded to Joyce Hardin as a result of 10 the Mr. Hardin's death, you should not make any 11 reduction because of the fault you have charged to 12 Mr. Hardin. The Court will enter a judgment based 13 on your verdict and, in entering judgment, will 14 reduce the total amount of damages by the 15 percentage of fault which you find is chargeable to 16 Mr. Hardin in accordance with the requirements of 17 the law. 18 30. You may not award any damages for pain 19 and suffering of Thomas Hardin. Such damages are 20 not recoverable in a wrongful death action. 21 Instead, Plaintiff is seeking damages for Joyce 22 Hardin's pain and suffering and loss of 23 companionship. 24 31. The purpose of an award of compensatory 25 damages is not to punish or penalize Reynolds for</p>	<p>1 negligence. 2 If you decide that punitive damages may be 3 warranted, we will proceed to the second part of 4 that issue, during which the parties may present 5 additional evidence and argument on the issue of 6 punitive damages. I will then give you additional 7 instructions, after which you will decide whether, 8 in your discretion, punitive damages will be 9 assessed and, if so, the amount. 10 You may, in your discretion, decline to assess 11 punitive damages. 12 33. The burden is on the Plaintiff to prove 13 by clear and convincing evidence that punitive 14 damages are warranted. "Clear and convincing 15 evidence" differs from the "greater weight of the 16 evidence" in that it is more compelling and 17 persuasive. As I have already instructed you, 18 "greater weight of the evidence" means the more 19 persuasive and convincing force and effect of the 20 entire evidence in the case. In contrast, "clear 21 and convincing evidence" is evidence that is 22 precise, explicit, lacking in confusion, and of 23 such weight that it produces a firm belief or 24 conviction, without hesitation, about the matter in 25 issue.</p>

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 08-00113-CA-31

MIRTHA LEDO, as Personal Representative
for the Estate of JOSE LEDO, deceased,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.

Defendants.

JURY TRIAL
PROCEEDINGS BEFORE THE HONORABLE MIGNA SANCHEZ-LLORENS
VOLUME 16
Pages 2152 to 2351

Miami-Dade County Courthouse
73 West Flagler Street
Courtroom 6-2
Miami, Florida
11:02 a.m. - 6:54 p.m.
Tuesday, November 1, 2016

Reported by:

Tracey S. LoCastro, RPR, FPR

TLS Reporting Inc.

www.tlsreporting.com

1 misleading or failed to disclose a material fact
2 concerning the health effects or addictive
3 nature of smoking cigarettes or both.
4 RJ Reynolds entered into an agreement to conceal
5 or omit information regarding the health effects
6 of cigarettes or their addictive nature with the
7 intention that smokers and the public would rely
8 on this information to their detriment.

9 Your consideration and use of these Engle
10 findings are subject to additional limitations.

11 First, you must not consider these findings
12 in determining whether plaintiff has proven
13 Mr. Ledo was a member of the Engle class. The
14 findings do not apply to plaintiff's claims in
15 this case unless you have first determined,
16 without considering or applying these findings,
17 that the plaintiff has proven that Mr. Ledo was
18 a class member.

19 Second, the findings that I just read to you
20 do not establish that RJ Reynolds is liable to
21 the plaintiff in this case; nor do they
22 establish whether Mr. Ledo was injured by
23 RJ Reynolds' conduct or the degree, if any, to
24 which RJ Reynolds' conduct was a legal cause of
25 Mr. Ledo's laryngeal cancer.

1 Third, the findings establish only what they
2 expressly state and you must not speculate or
3 guess as to the basis of those findings.

4 Fourth, the Engle findings pertain only to
5 conduct in the United States, and they do not
6 establish that any conduct in the United States
7 affected or impacted José Ledo while he was
8 living in Cuba.

9 Finally, the findings may not be considered
10 in any way when determining whether punitive
11 damages may be warranted. You must make your
12 determination regarding whether punitive damages
13 may be warranted based solely on the factual
14 evidence presented to you in this case [sic].

15 Manufacturing, selling and advertising
16 cigarettes are lawful activities; therefore
17 RJ Reynolds cannot be held liable merely for
18 manufacturing, selling or advertising
19 cigarettes.

20 The warning labels placed on cigarette packs
21 and advertisements by RJ Reynolds and other
22 tobacco companies complied with federal law,
23 and, after July 1st, 1969, RJ Reynolds had no
24 obligation to place any additional warnings on
25 their cigarette packages and advertisements.

1 As long as the cigarette packs bear the
2 federally mandated warnings, cigarette
3 advertising from July 1st, 1969, forward cannot
4 be the subject of any claim that the advertising
5 undermined or neutralized the warning or made
6 them less effective.

7 Plaintiff does not claim that RJ Reynolds
8 should have given additional or different
9 warnings on its cigarette packs or
10 advertisements.

11 I instruct you that effective August 9th,
12 1973, all Spanish-language cigarette advertising
13 was required to have Spanish-language warnings,
14 and RJ Reynolds complied with this requirement.

15 The next claim you must consider is
16 plaintiff's claim for fraudulent concealment.

17 On this claim, the issue for your
18 determination is whether José Ledo reasonably
19 relied to his detriment on a statement of
20 material fact by RJ Reynolds that concealed or
21 omitted material information not otherwise known
22 or available concerning the health effects or
23 addictive nature of smoking cigarettes, and, if
24 so, whether such reliance was a legal cause of
25 Mr. Ledo's laryngeal cancer and death.

1 RJ Reynolds cannot be held liable for
2 failure to speak. RJ Reynolds could only be
3 held liable if you find that it made a statement
4 that misled Mr. Ledo because it concealed or
5 omitted material fact not otherwise known or
6 available regarding the potential health effects
7 of smoking cigarettes and/or the potentially
8 addictive nature of smoking cigarettes.

9 Reasonable reliance on a statement that is
10 misleading because it conceals or omits a
11 material fact is a legal cause of Mr. Ledo's
12 laryngeal cancer and death if it directly and in
13 natural and continuous sequence produces or
14 contributes substantially to producing such
15 laryngeal cancer and death so that it can
16 reasonably be said that, but for the reliance,
17 his laryngeal cancer and death would not have
18 occurred. This means that plaintiff must prove
19 that, but for Mr. Ledo's reliance on a statement
20 by RJ Reynolds concealing or omitting a material
21 fact not otherwise known or available, he would
22 have acted differently and avoided his laryngeal
23 cancer and death. Mr. Ledo cannot be found to
24 have reasonably relied to his detriment on a
25 statement if he knew it was false or if its

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO.: 07-027976 (09)

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

PERTAINS TO:

MARC SIMON, as Personal
Representative of the
Estate of ANNA SIMON

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

Volume 21, Pages 3049 - 3160

BEFORE: The Honorable Jeffrey R. Levenson
DATE TAKEN: September 17th, 2018
TIME: (9:30) 9:33 a.m. - 11:44 a.m.
PLACE: Broward County Courthouse
201 S.E. 6th Street
Fort Lauderdale, Florida 33301

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were reported by:

Susan J. Sternberg, C.M.
United Reporting, Inc.
1218 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
954-525-2221

Page 3086

or omission of that fact.

On this claim for agreement to fraudulently conceal, Anna Simon may rely on a false statement even though its falsity could have been discovered if Anna Simon had made an investigation.

However, Mrs. Simon cannot be found to have reasonably relied on a statement if she knew it was false or its falsity was obvious to her, or if the fact allegedly concealed was already known to her.

If the greater weight of the evidence does not support the claim on this issue against one or both defendants, your verdict should be for the defendants or those defendants on this claim. However -- excuse me. For that defendant or those defendants on this claim.

However, if the greater weight of the evidence does support the claim of plaintiff on this claim against one or both defendants, then your verdict on this claim will be for plaintiff against that defendant or those defendants.

I hereby instruct you that plaintiff has

Page 3088

no obligation to place any additional warnings on their cigarette packages and advertisements.

Plaintiff does not allege that defendants failed to warn Anna Simon after July 1st, 1969, or that their advertising neutralized or undermined the warning labels on cigarette packaging after July 1st, 1969. However, defendants can be held liable as set forth in these instructions.

If your verdict is for defendants, you will not consider the matter of damages.

But if you find for plaintiff on one or more of his claims, then you will consider the amount of damages. Plaintiff has two alternative claims for damages. And if you find for plaintiff on one or more of these claims, the damages questions you answer will be determined by whether you found that COPD was a legal cause of Mrs. Simon's death.

In determining the total amount of damages, if any, to be awarded, you should not make any reduction because of the fault you have charged to Anna Simon. The Court will enter a judgment based on your verdict and, in entering judgment, will reduce the total amount

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made no claim for concealment or agreement to conceal information regarding smoking, health, or addiction before 1953.

Manufacturing, selling, and advertising cigarettes are lawful activities. Therefore, defendants cannot be held liable merely for manufacturing, selling, or advertising cigarettes. However, defendants can be held liable as set forth in these instructions.

During the trial, you have heard references to defendants' appearances before Congress and various regulatory agencies. Under the law, each defendant has the right to petition, provide information, and express its views to the government on the issue of policy and legislation concerning smoking and health.

These and similar communications with the government, advocacy efforts, and government submissions are protected under the First Amendment of the United States Constitution, as well as Florida law.

The warning labels placed on cigarette packs and advertisements by defendants and other tobacco companies complied with federal law, and, after July 1st, 1969, defendants had

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of damages by the percentage of fault which you find is chargeable to Mrs. Simon.

However, if you find for plaintiff on his claim of fraud by concealment or agreement to commit fraud by concealment, then the verdict will not be reduced to account for your finding of comparative fault and plaintiff will recover the full amount of damages you have awarded.

If you find for plaintiff on one or more of the claims and you find that COPD was a legal cause of Mrs. Simon's death, then you will consider only the damages available to plaintiff on his wrongful death claim.

In that event, you should determine and write on the verdict form, in dollars, the total amount of loss, injury or damage which the greater weight of the evidence shows Marc Simon sustained as a result of Anna Simon's injury and death.

In determining any damages to be awarded for the benefit of Marc Simon, you should consider certain elements of damage for which there is no exact standard for fixing the compensation to be awarded. Any such award should be fair and just in the light of the

1 IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
2 IN AND FOR BROWARD COUNTY, STATE OF FLORIDA
3 COMPLEX CIVIL DIVISION

4 CASE NO. 08-80000 (19)

5 IN RE: ENGLE PROGENY CASES
6 TOBACCO LITIGATION

7 Pertains to: LESLIE SCHLEFSTEIN, as
8 Personal Representative of the Estate of
9 DAWN SCHLEFSTEIN
10 Case No. 08-22558 (19)
11 -----/

12 JURY TRIAL BEFORE THE HONORABLE
13 Mily RODRIGUEZ-POWELL
14 CIRCUIT COURT JUDGE

15 (Volume 26)

16 Pages 3571 to 3723

17 Wednesday, January 31, 2018
18 1:25 p.m. - 4:45 p.m.

19 Broward County Courthouse
20 201 Southeast 6th Street
21 Courtroom 15155
22 Fort Lauderdale, Florida 33301

23 STENOGRAPHICALLY REPORTED BY:
24 SUSAN D. WASILEWSKI
25 Registered Professional Reporter
Certified Realtime Reporter
Certified Manager of Reporting Services
Certified Realtime Captioner
Florida Professional Reporter
Certified Court Reporter - New Jersey
~ Realtime Systems Administrator ~

1 If the greater weight of the evidence does not
2 support the plaintiff's claim, your verdict on the
3 claim is for R.J. Reynolds.

4 If, however, the greater weight of the
5 evidence does support the plaintiff's claim, then
6 your verdict will be for plaintiff and against R.J.
7 Reynolds on this claim.

8 If your verdict is for R.J. Reynolds, you will
9 not consider the matter of damages, but if the
10 greater weight of the evidence supports plaintiff's
11 claim, you should determine and write on the
12 verdict form in dollars the total amount of damage
13 which the greater weight of the evidence will
14 fairly and adequately compensate for injury to Dawn
15 Schlefstein and no one else.

16 You shall consider the following elements:
17 Any bodily injury sustained by Dawn Schlefstein and
18 any resulting pain and suffering, disability or
19 physical impairment, disfigurement, mental anguish,
20 inconvenience or loss of capacity for the enjoyment
21 of life experienced until June 2009 resulting from
22 Dawn Schlefstein's COPD/emphysema.

23 There is no exact standard for measuring such
24 damage. The amount should be fair and just in
25 light of the evidence; the reasonable value or

1 R.J. Reynolds Tobacco Company or its attorneys to
2 defend against lawsuits. Conduct related to the
3 proper defense of litigation, including conduct
4 related to the defense of this case, is protected
5 free speech.

6 During the trial, you have heard references to
7 R.J. Reynolds' appearance before Congress and
8 various regulatory agencies. Under the law, R.J.
9 Reynolds has the right to petition, provide
10 information, and express its views to the
11 Government on the issue of policy and legislation
12 concerning smoking and health.

13 These and similar communications with the
14 government, advocacy efforts and government
15 submissions are protected under the First Amendment
16 to the United States Constitution as well as
17 Florida law.

18 A final issue for your determination is
19 whether, in addition to compensatory damages,
20 punitive damages may be warranted under the
21 circumstances in this case against the defendant,
22 R.J. Reynolds Tobacco Company, as punishment and as
23 a deterrent to others. Any such damages would be
24 in addition to any compensatory damages you may
25 award.

1 expense of hospitalization and medical and nursing
2 care and treatment necessarily or reasonably
3 obtained by Dawn Schlefstein until June 2009
4 resulting from her COPD/emphysema.

5 If you find that R.J. Reynolds Tobacco Company
6 caused Dawn Schlefstein's COPD/emphysema and that
7 the COPD/emphysema resulted in an aggravation of an
8 existing disease or physical defect, or activation
9 of a latent disease or physical defect, you should
10 attempt to decide what portion of Dawn
11 Schlefstein's condition resulted from the
12 aggravation or activation.

13 If you can make that determination, then you
14 should award only those damages resulting from the
15 aggravation or activation. However, if you cannot
16 make that determination or if it cannot be said
17 that the condition would have existed apart from
18 Dawn Schlefstein's COPD/emphysema, then you should
19 award damages for the entire condition suffered by
20 Dawn Schlefstein.

21 The manufacture, sale, and advertisement of
22 cigarettes are lawful activities. R.J. Reynolds
23 cannot be held liable merely for manufacturing,
24 selling, or advertising cigarettes. During the
25 trial, you heard evidence about actions taken by

1 The trial of the punitive damages claim is
2 divided into two parts. In this first part, you
3 will decide whether the conduct of R.J. Reynolds
4 was such that punitive damages may be warranted.

5 If you decide that punitive damages may be
6 warranted, we will proceed to a second part on that
7 issue, during which the parties may present
8 additional evidence and argument on the issue of
9 punitive damages.

10 I will then give you additional legal
11 instructions, after which you will decide whether,
12 in your discretion, punitive damages will be
13 assessed, and if so, the amount.

14 You may, in your discretion, decline to assess
15 punitive damages. Your decision whether to award
16 punitive damages must be based on the evidence you
17 heard in this trial and not based on the findings I
18 previously read to you.

19 Punitive damages are warranted if you find, by
20 clear and convincing evidence, that, one, the
21 conduct causing injury to Dawn Schlefstein was so
22 gross and flagrant as to show a reckless disregard
23 of human life or of the safety of persons exposed
24 to the effects of such conduct;

25 Or, two, the conduct showed such an entire

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2016 CA 008532 XXXX MB

JULIE ADAMSON, as Personal
Representative of the Estate of
JACKLYN ADAMSON,
Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
VOLUME 11 (Pages 2982 - 3381)

DATE TAKEN: November 21, 2017

TIME: 8:35 a.m. - 5:22 p.m.

PLACE: Palm Beach County Courthouse
205 N. Dixie Highway
Courtroom 9C

BEFORE: MEENU SASSER, Circuit Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:
Gina Rodriguez, RPR, CRR, CCP

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1 for Julie Adamson, and you will proceed to
2 decide the other issues on Julie Adamson's
3 claim.

4 If you find that Jacklyn Adamson is a
5 member of the Engle class, then certain findings
6 will be the law in this case and must be
7 accepted by you as true.

8 They are: Smoking cigarettes causes aortic
9 aneurysm; bladder cancer; cerebrovascular
10 disease; cervical cancer; chronic obstructive
11 pulmonary disease; coronary heart disease;
12 esophageal cancer; kidney cancer; laryngeal
13 cancer; lung cancer, specifically
14 adenocarcinoma, large cell carcinoma, small cell
15 carcinoma and squamous cell carcinoma;
16 complications of pregnancy; oral cavity and
17 tongue cancer; pancreatic cancer; peripheral
18 vascular disease; pharyngeal cancer; and stomach
19 cancer.

20 Nicotine in cigarettes is addictive. The
21 Engle defendants, including R.J. Reynolds,
22 placed cigarettes on this market that were
23 defective and unreasonably dangerous. The Engle
24 defendants, including R.J. Reynolds, were
25 negligent. The Engle defendants, including

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1 lung cancer or whether she was addicted to
2 cigarettes containing nicotine and, if so,
3 whether such addiction was a legal cause of her
4 death.

5 These findings do not apply to Plaintiff's
6 claims in this case unless you have first
7 determined, without considering or applying
8 those findings, that Plaintiff has met her
9 burden of proving both of these issues.

10 Second, these findings do not establish
11 that R.J. Reynolds is liable to Plaintiff in
12 this case, nor do they establish whether Jacklyn
13 Adamson was injured by R.J. Reynolds' product or
14 conduct or the degree, if any, to which
15 R.J. Reynolds' product or conduct was a legal
16 cause of Jacklyn Adamson's death.

17 Third, these findings establish only what
18 they expressly state, and you must not speculate
19 or guess as to the basis of the findings.

20 Fourth, the findings may not be considered
21 when determining whether punitive damages may be
22 warranted against R.J. Reynolds. You must treat
23 these findings as if they do not exist, and you
24 must make determinations -- and you must make
25 your determination regarding whether punitive

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1 R.J. Reynolds, concealed or omitted material
2 information not otherwise known or available,
3 knowing the material was false or misleading, or
4 failed to disclose a material fact concerning or
5 proving the health effects or addictive nature
6 of smoking cigarettes.

7 R.J. Reynolds entered into an agreement to
8 conceal or omit information regarding the health
9 effects of cigarette smoking or addictive nature
10 of smoking cigarettes with the intention that
11 smokers and that members of the public rely to
12 their detriment.

13 The Engle defendants include R.J. Reynolds
14 Tobacco Company, Philip Morris Incorporated,
15 Philip Morris USA, Lorillard Tobacco Company,
16 Brown & Williamson Tobacco Corporation,
17 individually and as a successor by merger to the
18 American Tobacco Company, Liggett Group, Inc.,
19 Brooke Group Holding, Inc., the Council for
20 Tobacco Research, Inc., and The Tobacco
21 Institute, Inc.

22 Your consideration and use of these
23 findings will be subject to certain limitations.
24 First, you must not consider these findings in
25 determining whether Jacklyn Adamson had primary

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1 damages may be warranted based solely upon the
2 evidence of R.J. Reynolds' conduct presented to
3 you in this trial.

4 Manufacturing, selling, and advertising
5 cigarettes are lawful activities. Therefore,
6 R.J. Reynolds Tobacco Company -- R.J. Reynolds
7 cannot be held liable merely for manufacturing,
8 selling, or advertising cigarettes.

9 During the trial, you have heard references
10 to R.J. Reynolds' appearance before Congress and
11 various regulatory agencies. Under the law,
12 R.J. Reynolds has a right to petition, provide
13 information, and express its views to the
14 government on the issue of policy and
15 legislation concerning smoking and health.

16 These and similar communications with
17 government advocacy efforts and government
18 submissions are protected under the First
19 Amendment to the United States Constitution as
20 well as Florida law.

21 Therefore, R.J. Reynolds cannot be held
22 liable merely for exercising its First Amendment
23 rights under the United States Constitution.

24 Conduct related to the defense of
25 litigation is protected free speech. Therefore,

1 R.J. Reynolds cannot be held liable or punished
2 for defending themselves in litigation or for
3 exercising its rights under the U.S.
4 Constitution.

5 Julie Adamson makes no claim that
6 R.J. Reynolds failed to adequately warn Jacklyn
7 Adamson of the dangers or addictiveness of
8 smoking cigarettes. There is no claim that
9 cigarette packs or advertisements should have
10 contained additional or different information or
11 any graphics -- or excuse me, any graphics
12 warning about the danger or addictiveness of
13 smoking cigarettes.

14 In addition, as long as the cigarette packs
15 bear the federally mandated warnings, cigarette
16 advertising from July 1st, 1969 forward cannot
17 be the subject of any claim that the advertising
18 undermined or neutralized the warnings or made
19 them less effective.

20 The next issue for your determination is
21 whether cigarettes manufactured by R.J. Reynolds
22 Tobacco Company were a legal cause of Jacklyn
23 Adamson's death.

24 R.J. Reynolds' cigarettes were a legal
25 cause of Jacklyn Adamson's death if those

1 statements to Julie -- excuse me -- Jacklyn
2 Adamson regarding the potential health effects
3 of smoking cigarettes, the potentially addictive
4 nature of smoking cigarettes, or any other
5 issue.

6 R.J. Reynolds can only be held liable for
7 fraudulent concealment if you find that
8 R.J. Reynolds made a statement that misled
9 Jacklyn Adamson because it concealed or omitted
10 a material fact not otherwise known or available
11 regarding the health -- potential health effects
12 of smoking cigarettes and/or the potentially
13 addictive nature of smoking cigarettes.

14 On this claim, the issue for your
15 determination is whether Jacklyn Adamson
16 reasonably relied to her detriment on any
17 statement of material fact by R.J. Reynolds that
18 concealed or omitted material information not
19 otherwise known or available concerning the
20 health effects or addictive nature of smoking
21 cigarettes and, if so, whether such reliance was
22 a legal cause of Jacklyn Adamson's death.

23 Reasonable reliance on a statement that is
24 misleading because it conceals or omits a
25 material fact is a legal cause of injury if it

1 cigarettes directly and in natural and
2 continuous sequence produced or contributed
3 substantially to producing such death so that it
4 can be reasonably said that but for those
5 cigarettes, the death would not have occurred.

6 In order to be regarded as a legal cause of
7 death, R.J. Reynolds' cigarettes need not be the
8 only cause. R.J. Reynolds' cigarettes may be a
9 legal cause of death even though they operate in
10 combination with the act of another, some
11 natural cause, or some other cause if
12 R.J. Reynolds' cigarettes contributed
13 substantially in producing the death.

14 If the greater weight of the evidence does
15 not support Julie Adamson's claim on this issue,
16 then your verdict on this issue should be for
17 R.J. Reynolds.

18 If the greater weight of the evidence
19 supports Julie Adamson's claim on this issue,
20 your verdict on this issue should be for Julie
21 Adamson and against R.J. Reynolds.

22 The next claim you must consider is Julie
23 Adamson's claim for fraudulent concealment.
24 R.J. Reynolds cannot be held liable for
25 fraudulent concealment for failure to make any

1 directly and in natural and continuous sequence
2 produces or contributes substantially to
3 producing such injury so that it can reasonably
4 be said that but for reliance, the injury would
5 not have occurred.

6 In order to be regarded as a legal cause of
7 death, reasonable reliance on a statement that
8 is misleading because it conceals or omits a
9 material fact may not be the only cause.
10 Reasonable reliance on a statement that is
11 misleading because it conceals or omits a
12 material fact may be a legal cause of death even
13 though it operates in combination with the act
14 of another, some natural cause, or some other
15 cause if the reliance contributes substantially
16 to producing the death.

17 A material fact is one that is of such
18 importance that Jacklyn Adamson would not have
19 acted as she did but for the concealment or
20 omission the fact.

21 Jacklyn Adamson may not have relied if she
22 knew it was false or its falsity was obvious or
23 if the fact allegedly concealed was already
24 known.

25 If the greater weight of the evidence does

2321

1 IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
2 IN AND FOR BROWARD COUNTY, STATE OF FLORIDA
3 COMPLEX CIVIL DIVISION

4 CASE NO. 08-80000 (19)

5 IN RE: ENGLE PROGENY CASES TOBACCO
6 LITIGATION

7 Pertains to: Bertie Thomas, as Personal
8 Representative of the Estate of Marvin
9 Thomas

10 Case No.: 07-CV-036432 (19)
11 -----/

12 JURY TRIAL BEFORE THE HONORABLE
13 JOHN J. MURPHY, III
14 CIRCUIT COURT JUDGE

15 (Volume 16)

16 Pages 2321 to 2524

17 Thursday, July 27, 2017
18 11:50 a.m. - 4:58 p.m.

11:50:11AM

19 Broward County Courthouse
20 201 Southeast 6th Street
21 Courtroom 14150
22 Fort Lauderdale, Florida 33301

23 STENOGRAPHICALLY REPORTED BY:
24 NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R.
25 Certificate in Realtime Systems Administration
Certified Realtime Reporter
Registered Professional Reporter
Florida Professional Reporter

<p style="text-align: right;">2342</p> <p>1 Defendant R.J. Reynolds Tobacco Company as well as</p> <p>2 Philip Morris USA, Inc., Lorillard Tobacco Company,</p> <p>3 Liggett Group, LLC, Brown & Williamson Tobacco</p> <p>4 Corporation, American Tobacco Company, the Tobacco</p> <p>5 Industry Research Committee, the Council for</p> <p>6 Tobacco Research-USA, Inc., and The Tobacco</p> <p>7 Institute, Inc.</p> <p>8 If the greater weight of the evidence does not</p> <p>9 support the Plaintiff's claim that Marvin Thomas</p> <p>10 relied on any statement made in furtherance of an</p> <p>11 agreement to conceal material information</p> <p>12 concerning the health effects or addictive nature</p> <p>13 of smoking cigarettes, your verdict is for the</p> <p>14 Defendant on that claim.</p> <p>15 However, if the greater weight supports the</p> <p>16 Plaintiff's claim that Marvin Thomas relied on any</p> <p>17 statement made in furtherance of an agreement to</p> <p>18 conceal or omit information -- omit information,</p> <p>19 material information concerning the health effects</p> <p>20 or addictive nature of smoking cigarettes, your</p> <p>21 verdict will be for Plaintiff on this claim.</p> <p>22 Instruction Number 15.</p> <p>23 I hereby instruct you that Plaintiff has made</p> <p>24 no claim for conspiracy to conceal information</p> <p>25 regarding smoking, health, or addiction before</p>	<p style="text-align: right;">2344</p> <p>1 Constitution, as well as Florida law.</p> <p>2 Instruction Number 19.</p> <p>3 The warning labels placed on cigarette packs</p> <p>4 and advertisements by R.J. Reynolds and other</p> <p>5 tobacco companies complied with federal law, and,</p> <p>6 after July 1, 1969, R.J. Reynolds had no obligation</p> <p>7 to place any additional warnings on its cigarette</p> <p>8 packages and advertisements.</p> <p>9 Further, as long as the cigarette packs bear</p> <p>10 the federally mandated warnings, cigarette</p> <p>11 advertising from July 1st, 1969, cannot be the</p> <p>12 subject of any claim that the advertising</p> <p>13 undermined or neutralized the warnings or made them</p> <p>14 less effective.</p> <p>15 Instruction Number 20.</p> <p>16 The next issue for your determination is the</p> <p>17 issue of comparative fault. You must determine and</p> <p>18 write on the verdict form the percentage of fault</p> <p>19 on the part of Marvin Thomas and the percentage of</p> <p>20 fault, if any, that you charge to Defendant, R.J.</p> <p>21 Reynolds Tobacco Company, which you find -- found</p> <p>22 to be liable to Plaintiff for legally causing</p> <p>23 Marvin Thomas' injury and death.</p> <p>24 Fault is the failure to use reasonable care,</p> <p>25 which is the care that a reasonably careful person</p>
<p style="text-align: right;">2343</p> <p>1 1953.</p> <p>2 Instruction Number 16.</p> <p>3 The manufacture and sale of cigarettes are</p> <p>4 lawful activities. R.J. Reynolds cannot be held</p> <p>5 liable merely for manufacturing or selling</p> <p>6 cigarettes.</p> <p>7 Instruction 17.</p> <p>8 During the trial, you've heard evidence about</p> <p>9 actions taken by R.J. Reynolds Tobacco Company or</p> <p>10 its attorneys to defend against lawsuits, including</p> <p>11 this one. Conduct related to the proper defense of</p> <p>12 litigation, including conduct related to the</p> <p>13 defense of this case, is protected free speech.</p> <p>14 Instruction Number 18.</p> <p>15 During the trial, you have heard references to</p> <p>16 R.J. Reynolds' appearance before Congress and</p> <p>17 various regulatory agencies. Under the law, R.J.</p> <p>18 Reynolds has the right to petition, provide</p> <p>19 information, and express their views to the</p> <p>20 government on the issue of policy and legislation</p> <p>21 concerning smoking and health.</p> <p>22 These and other -- excuse me. These and</p> <p>23 similar communications with the government advocacy</p> <p>24 efforts and government submissions are protected</p> <p>25 under the First Amendment to the United States</p>	<p style="text-align: right;">2345</p> <p>1 would use under like circumstances. Fault is doing</p> <p>2 something that a reasonably careful person would</p> <p>3 not do under like circumstances, or failing to do</p> <p>4 something a reasonably careful person would do</p> <p>5 under like circumstances.</p> <p>6 Fault is a legal cause of injury and damage --</p> <p>7 injury and damage if it directly and in natural and</p> <p>8 continuous sequence produces or contributes</p> <p>9 substantially to producing such injury and death,</p> <p>10 so that it can reasonably be said that but for the</p> <p>11 fault, the injury and death would not have</p> <p>12 occurred.</p> <p>13 In order to be regarded as a legal cause of</p> <p>14 injury and death, fault need not be the only cause.</p> <p>15 Fault may be a legal cause of injury and death,</p> <p>16 even though it operates in combination with the act</p> <p>17 of another, such natural cause, or some other cause</p> <p>18 if the fault contributes substantially to producing</p> <p>19 the injury and death.</p> <p>20 You should determine and write on the verdict</p> <p>21 what percentage of total fault is chargeable to</p> <p>22 Marvin Thomas, if any, and what percentage of total</p> <p>23 fault, if any, is chargeable to the Defendant, R.J.</p> <p>24 Reynolds Tobacco Company.</p> <p>25 Instruction 21.</p>

Page 2735

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 08-80000(19)

IN RE: ENGLE PROGENY CASES

TOBACCO LITIGATION

Pertains to: Howles, Mary, 2007-CV-034919

TRIAL PROCEEDINGS BEFORE
THE HONORABLE MILY RODRIGUEZ-POWELL

VOLUME 22

(Pages 2735 - 2885)

DATE TAKEN: WEDNESDAY, NOVEMBER 9, 2016

TIME: 1:23 P.M. - 4:30 P.M.

PLACE: BROWARD COUNTY COURTHOUSE
201 SOUTHEAST 6TH STREET
FORT LAUDERDALE, FLORIDA 33301

STENOGRAPHICALLY REPORTED BY:

CARMEN J. THOMAS, RPR

<p style="text-align: right;">Page 2872</p> <p>1 You shall consider the following elements.</p> <p>2 Any bodily injury sustained by Mary Howles that</p> <p>3 resulted in pain and suffering, disability, or</p> <p>4 physical impairment, disfigurement, mental anguish,</p> <p>5 inconvenience, or loss of capacity for the</p> <p>6 enjoyment of life experience in the past or to be</p> <p>7 experienced in the future resulting from Mary</p> <p>8 Howles' lung cancer and COPD, emphysema. There is</p> <p>9 no exact standard for measuring such damage. The</p> <p>10 amount should be fair and just in light of the</p> <p>11 evidence.</p> <p>12 In determining the total amount of damages,</p> <p>13 you should not make any reduction because of the</p> <p>14 negligence of Mary Howles. The Court, in entering</p> <p>15 judgment, will reduce the total amount of damages</p> <p>16 by the percentage of responsibility which you find</p> <p>17 is chargeable to Mary Howles.</p> <p>18 If the greater weight of the evidence shows</p> <p>19 Mary Howles has been permanently injured, you may</p> <p>20 consider her life expectancy. The mortality tables</p> <p>21 received in evidence may be considered in</p> <p>22 determining how long Mary Howles may be expected to</p> <p>23 live. Mortality tables are not binding on you, but</p> <p>24 may be considered together with other evidence in</p> <p>25 the case bearing on Mary Howles' health, age,</p>	<p style="text-align: right;">Page 2874</p> <p>1 communications with the government advocacy efforts</p> <p>2 and government submissions are protected under the</p> <p>3 First Amendment to the United States Constitution</p> <p>4 as well as Florida law.</p> <p>5 The warning labels placed on cigarette packs</p> <p>6 by Philip Morris USA, Inc., and R.J. Reynolds</p> <p>7 Tobacco Company and other tobacco companies</p> <p>8 complied with federal law. After July 1, 1969,</p> <p>9 Philip Morris USA, Inc., and R.J. Reynolds Tobacco</p> <p>10 Company and other tobacco companies had no</p> <p>11 obligation to place any additional warnings on</p> <p>12 their cigarette packages.</p> <p>13 Further, as long as the cigarette packs bear</p> <p>14 the federally mandated warnings, cigarette</p> <p>15 advertising after July 1, 1969, cannot be the</p> <p>16 subject of any claim that the advertising</p> <p>17 undermined or neutralized the warnings or made them</p> <p>18 less effective.</p> <p>19 During the trial, you heard evidence about</p> <p>20 actions taken by Philip Morris USA, Inc., and R.J.</p> <p>21 Reynolds Tobacco Company or their attorneys to</p> <p>22 defend against lawsuits, including this one. The</p> <p>23 conduct related to the proper defense of</p> <p>24 litigation, including conduct related to the</p> <p>25 defense of this case, is protected free speech.</p>
<p style="text-align: right;">Page 2873</p> <p>1 physical condition, before and after the injury,</p> <p>2 and determining the probable lengths of her life.</p> <p>3 The fact that Philip Morris USA and R.J.</p> <p>4 Reynolds Tobacco Company is a corporation must not</p> <p>5 prejudice you in any of your deliberations or in</p> <p>6 your verdict. You may not discriminate between</p> <p>7 corporations and natural individuals. Both are</p> <p>8 persons in the eyes of the law, and both are</p> <p>9 entitled to the same fair and impartial</p> <p>10 consideration by the same legal standards.</p> <p>11 Philip Morris USA, Inc., and R.J. Reynolds</p> <p>12 Tobacco Company are responsible for the conduct of</p> <p>13 their agents and employees acting within the scope</p> <p>14 and course of their agency and employment.</p> <p>15 The manufacture, sale and advertisement of</p> <p>16 cigarettes is a lawful activity. The Defendants</p> <p>17 cannot be held liable merely for manufacturing,</p> <p>18 selling or advertising cigarettes.</p> <p>19 During the trial, you have heard references</p> <p>20 to Defendants' appearances before Congress and</p> <p>21 various regulatory agencies. Under the law, the</p> <p>22 Defendants have the right to petition, provide</p> <p>23 information and express their views to the</p> <p>24 government on the issue of policy and legislation</p> <p>25 concerning smoking and health. These and similar</p>	<p style="text-align: right;">Page 2875</p> <p>1 The final issue for your determination is</p> <p>2 whether, in addition to compensatory damages,</p> <p>3 punitive damages may be warranted under the</p> <p>4 circumstances of this case against Philip Morris</p> <p>5 USA and/or R.J. Reynolds Tobacco Company as</p> <p>6 punishment and as a deterrent to others. Any such</p> <p>7 damages would be in addition to any compensatory</p> <p>8 damages you may award.</p> <p>9 The trial of the punitive damages claim is</p> <p>10 divided into two parts. In this first part, you</p> <p>11 will decide whether the conduct of Philip Morris</p> <p>12 USA, Inc., and/or R.J. Reynolds Tobacco Company was</p> <p>13 such that punitive damages may be warranted. If</p> <p>14 you decide punitive damages may be warranted, we</p> <p>15 will proceed to a second part on that issue during</p> <p>16 which the parties may present additional evidence</p> <p>17 and argument on the issue of punitive damages. I</p> <p>18 will then give you additional legal instructions,</p> <p>19 after which you will decide whether, in your</p> <p>20 discretion, punitive damages will be assessed and</p> <p>21 if so, the amount. You may, in your discretion,</p> <p>22 decline to assess punitive damages. Your decision</p> <p>23 whether to award punitive damages must be based on</p> <p>24 evidence you heard in this trial and not based on</p> <p>25 the findings that I've previously read to you.</p>

3351

1 IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
2 IN AND FOR BROWARD COUNTY, STATE OF FLORIDA
3 COMPLEX CIVIL DIVISION

4 CASE NO. 08-80000 (19)

5 IN RE: ENGLE PROGENY CASES
6 TOBACCO LITIGATION

7 Pertains to: Alan Konzelman as Personal
8 Representative of the Estate of Eleanor
9 Konzelman

10 Case No. 2008-CV-019620 (19)
-----/

11 JURY TRIAL BEFORE THE HONORABLE
12 JOHN J. MURPHY, III
13 CIRCUIT COURT JUDGE

14 (Volume 19)

15 Pages 3351 to 3524

16 Friday, October 21, 2016
17 8:45 a.m. - 12:14 p.m.

08:45:33AM

18 Broward County Courthouse
19 201 Southeast 6th Street
20 Courtroom 850
21 Fort Lauderdale, Florida 33301

22 STENOGRAPHICALLY REPORTED BY:
23 NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R.
24 Certificate in Realtime Systems Administration
25 Certified Realtime Reporter
Registered Professional Reporter
Florida Professional Reporter

<p>3408</p> <p>1 importance that Mrs. Konzelman would not have acted</p> <p>2 as she did but for the concealment or omission of</p> <p>3 that fact.</p> <p>4 Mrs. Konzelman cannot be found to have</p> <p>5 reasonably relied on the concealment or omission of</p> <p>6 a material fact if the fact allegedly concealed was</p> <p>7 already known to her.</p> <p>8 If the greater weight of the evidence does not</p> <p>9 support the claim on this issue against Reynolds,</p> <p>10 your verdict should be for Reynolds on this claim.</p> <p>11 However, if the greater weight of the evidence does</p> <p>12 support the claim of Plaintiff against Reynolds,</p> <p>13 then your verdict will be for Plaintiff on this</p> <p>14 claim.</p> <p>15 Instruction 14. The next claim you must</p> <p>16 consider is the Plaintiff's claim that R.J.</p> <p>17 Reynolds agreed to conceal or omit material</p> <p>18 information not otherwise known or available</p> <p>19 regarding the health effects of cigarettes or the</p> <p>20 addictive nature of cigarettes.</p> <p>21 On this claim, the issue for your</p> <p>22 determination is whether Mrs. Konzelman reasonably</p> <p>23 relied on an act or omission made in furtherance of</p> <p>24 Reynolds' agreement to conceal or omit information</p> <p>25 not otherwise known or available concerning the</p>	<p>3410</p> <p>1 importance that Mrs. Konzelman would not have acted</p> <p>2 as she did but for the concealment or omission of</p> <p>3 that fact.</p> <p>4 Mrs. Konzelman cannot be found to have</p> <p>5 reasonably relied on an act, omission -- or</p> <p>6 omission made in furtherance of an agreement to</p> <p>7 conceal if the facts allegedly concealed was</p> <p>8 already known to her.</p> <p>9 R.J. Reynolds Tobacco Company is legally</p> <p>10 responsible for each act or omission by each of its</p> <p>11 co-conspirators made in furtherance of their</p> <p>12 agreement to conceal or omit material information</p> <p>13 not otherwise known or available regarding the</p> <p>14 health effects of cigarette smoking or the</p> <p>15 addictive nature of smoking cigarettes.</p> <p>16 These companies and organizations include R.J.</p> <p>17 Reynolds, as well as Philip Morris USA, Inc.,</p> <p>18 Lorillard Tobacco Company, Liggett Group LLC,</p> <p>19 Brown & Williamson Tobacco Corporation, the</p> <p>20 American Tobacco Company, the Tobacco Industry</p> <p>21 Research Committee, the Council for Tobacco</p> <p>22 Research, and The Tobacco Institute, Inc.</p> <p>23 If the greater weight of the evidence does not</p> <p>24 support the claim on this issue against Reynolds,</p> <p>25 your verdict should be for Reynolds on this claim.</p>
<p>3409</p> <p>1 health effects or addictive nature of cigarettes</p> <p>2 and, if so, whether such reliance was a legal cause</p> <p>3 of her COPD and death.</p> <p>4 Reasonable reliance on an act or omission made</p> <p>5 in furtherance of an agreement to conceal or omit</p> <p>6 information not otherwise known or available is a</p> <p>7 legal cause of COPD and death if it directly and in</p> <p>8 natural and continuous sequence produces or</p> <p>9 contributes substantially to producing the COPD and</p> <p>10 death, so that it can reasonably be said that, but</p> <p>11 for the reasonable reliance on an act or omission</p> <p>12 made in furtherance of the agreement to conceal or</p> <p>13 omit, Mrs. Konzelman's COPD and death would not</p> <p>14 have occurred.</p> <p>15 This means that the Plaintiff must prove that</p> <p>16 but for her reliance on the act or omission,</p> <p>17 Mrs. Konzelman would have acted differently and</p> <p>18 avoided her COPD and death.</p> <p>19 In order to be regarded as a legal cause of</p> <p>20 COPD and death, reasonable reliance need not be the</p> <p>21 only cause. Reasonable reliance may be a legal</p> <p>22 cause of COPD and death, even though it operates in</p> <p>23 combination with some other cause if it contributes</p> <p>24 substantially to producing COPD and death.</p> <p>25 A material fact is one that is of such</p>	<p>3411</p> <p>1 However, if the greater weight of the evidence does</p> <p>2 support the claim of Plaintiff on this claim, then</p> <p>3 your verdict on this claim will be for Plaintiff.</p> <p>4 Instruction 15. The manufacture,</p> <p>5 advertisement, and sale of cigarettes are lawful</p> <p>6 activities. Thus, R.J. Reynolds cannot be held</p> <p>7 liable merely for manufacturing, selling or</p> <p>8 advertising cigarettes.</p> <p>9 Instruction 16. During the trial, you heard</p> <p>10 evidence about actions taken by R.J. Reynolds</p> <p>11 Tobacco Company or its attorneys to defend against</p> <p>12 lawsuits, including this one. Conduct related to</p> <p>13 the proper defense of litigation, including conduct</p> <p>14 related to the defense of this case, is protected</p> <p>15 free speech.</p> <p>16 Instruction Number 17. During the trial, you</p> <p>17 have heard reference -- references to Reynolds'</p> <p>18 appearance before Congress and various regulatory</p> <p>19 agencies. Under the law, Reynolds has a right to</p> <p>20 petition, to provide information, and express their</p> <p>21 views to the government on the issue of policy and</p> <p>22 legislation concerning smoking and health.</p> <p>23 These and similar communications with the</p> <p>24 government, advocacy efforts, and government</p> <p>25 submissions are protected under the First Amendment</p>

<p>3412</p> <p>1 to the US Constitution, as well as Florida law.</p> <p>2 Instruction Number 18. The warning labels</p> <p>3 placed on cigarette packs and advertisements by</p> <p>4 Reynolds and other tobacco companies complied with</p> <p>5 federal law, and, after July 1st, 1996 [sic],</p> <p>6 Reynolds had no obligation to place any additional</p> <p>7 warnings on its cigarette packages and</p> <p>8 advertisements.</p> <p>9 Further, as long as the cigarette packs bear</p> <p>10 the federally mandated warnings, cigarette</p> <p>11 advertising from July 1, 1969, cannot be the</p> <p>12 subject of any claim that advertising undermined or</p> <p>13 neutralized the warnings or made them less</p> <p>14 effective.</p> <p>15 Instruction 19. The next issue for your</p> <p>16 determination is the issue of comparative</p> <p>17 responsibility. You must determine and write on</p> <p>18 the verdict form the percentage of responsibility</p> <p>19 on the part of Elaine Konzelman, if any, and the</p> <p>20 percentage of responsibility, if any, that you</p> <p>21 charge to Defendant R.J. Reynolds Tobacco Company</p> <p>22 which you found to be liable to Plaintiff for</p> <p>23 legally causing Elaine Konzelman's loss, injury or</p> <p>24 damage.</p> <p>25 Negligence is a failure to use reasonable</p>	<p>3414</p> <p>1 total fault, if any, is chargeable to the</p> <p>2 Defendant, R.J. Reynolds Tobacco Company.</p> <p>3 Your determination of R.J. Reynolds' fault, if</p> <p>4 any, must be based solely on the conduct of R.J.</p> <p>5 Reynolds, if any, that was a legal cause of</p> <p>6 Mrs. Konzelman's COPD. In making this</p> <p>7 determination, you should not consider any alleged</p> <p>8 conduct of R.J. Reynolds that you find was not a</p> <p>9 legal cause of Mrs. Konzelman's COPD.</p> <p>10 Instruction Number 20. If your verdict is for</p> <p>11 the Defendant, you will not consider the matter of</p> <p>12 damages. But if the greater weight of the evidence</p> <p>13 supports one or more of Plaintiff's claims, you</p> <p>14 should determine and write on the verdict form, in</p> <p>15 dollars, the total amount of loss, injury or damage</p> <p>16 which the greater weight of the evidence shows Alan</p> <p>17 Konzelman sustained as a result of Elaine</p> <p>18 Konzelman's injury and death, including any damages</p> <p>19 that Alan Konzelman is reasonably certain to incur</p> <p>20 or experience in the future.</p> <p>21 In determining any damages to be awarded for</p> <p>22 the benefit of Elaine Konzelman's surviving spouse,</p> <p>23 Alan Konzelman, you shall consider certain elements</p> <p>24 of damage for which there is no exact standard for</p> <p>25 fixing the compensation to be awarded. Any such</p>
<p>3413</p> <p>1 care, which is the care that a reasonably careful</p> <p>2 person would use under like circumstances.</p> <p>3 Negligence is doing something that a reasonably</p> <p>4 careful person would not do under like</p> <p>5 circumstances, or failing to do something a</p> <p>6 reasonably careful person would do under like</p> <p>7 circumstances.</p> <p>8 Negligence is a legal cause of loss, injury or</p> <p>9 damage if it directly and in natural and continuous</p> <p>10 sequence produces or contributes substantially to</p> <p>11 producing such loss, injury or damage, so that it</p> <p>12 can reasonably be said that, but for the</p> <p>13 negligence, the loss, injury or damage would not</p> <p>14 have occurred.</p> <p>15 In order to be regarded as a legal cause of</p> <p>16 loss, injury or damage, negligence/fault need not</p> <p>17 be the only cause. Negligence may be a legal cause</p> <p>18 of loss, injury or damage, even though it operates</p> <p>19 in combination with the act of another, such</p> <p>20 natural cause, or some other cause if the</p> <p>21 negligence contributes substantially to producing</p> <p>22 the loss, injury or damage.</p> <p>23 You should determine and write on the verdict</p> <p>24 what percentage of the total fault is chargeable to</p> <p>25 Elaine Konzelman, if any, and what percentage of</p>	<p>3415</p> <p>1 award should be fair and just in light of the</p> <p>2 evidence regarding the following elements:</p> <p>3 Alan Konzelman's loss of his wife, Elaine</p> <p>4 Konzelman's companionship and protection, and his</p> <p>5 mental pain and suffering as a result of Elaine</p> <p>6 Konzelman's injury and death. In determining the</p> <p>7 duration of the losses, you may consider the joint</p> <p>8 life expectancy of Elaine Konzelman and Alan</p> <p>9 Konzelman, together with the other evidence in the</p> <p>10 case.</p> <p>11 In determining any damages sustained by Elaine</p> <p>12 Konzelman's estate, you shall consider the</p> <p>13 following elements:</p> <p>14 Medical expenses due to the decedent, Elaine</p> <p>15 Konzelman's COPD and death. In determining the</p> <p>16 total amount of damages, if any, to be awarded to</p> <p>17 Plaintiff as a result of Mrs. Konzelman's</p> <p>18 COPD/emphysema and death, you should not make any</p> <p>19 reduction because of the fault you have charged to</p> <p>20 Mrs. Konzelman.</p> <p>21 The Court will enter a judgment based upon</p> <p>22 your verdict and, in entering judgment, will reduce</p> <p>23 the total amount of damages by the percentage of</p> <p>24 fault which you find chargeable to Mrs. Konzelman.</p> <p>25 You may not award damages for any pain and</p>